INDEX

TABLE OF CONTENTS

	Page
Petition	1
Opinions Below	2
Jurisdiction	2
Questions Presented	3
Statutes Involved	4
Statement of the Case	4
1. Kind of Proceedings	4
2. The Facts	5
Despite UMW's Certification, Blue Diamond Refused to Bargain Except on an Individual Basis	6
Employees Picket Blue Diamond's Mine in Protest Over its Refusal to Bargain on a Group Basis	7
Blue Diamond Refused to Recognize SLU in January, 1965, but Agreed to Recognize and Bargain With it in April, 1965. Within 14-18 Hours Blue Diamond Executed a SLU Contract	8
3. The Trial Examiner Dismissed the Complaint Against Unions	10
a. The Examiner Concluded that Picketing Was in Protest of the Employer's Unfair Labor Practice	10
b. The Examiner Rejected General Counsel's	

Page

Argument that Section 10(b)'s Six-Month Limitation Period Precluded Consideration of Blue Diamond's Unfair Labor Practices 11

c. The Examiner Found that the Presumption of UMW's Majority Status Had Not Been Rebutted by Competent Evidence 11

4. The Board Adopts the Examiner's Findings But Disagrees With His Conclusions and Recommendations 12

5. The Sixth Circuit Agreed With the Board 13

6. The Sixth Circuit Overruled Union's Rehearing Petition 15

Reasons For Granting the Writ 16

I. The Sixth Circuit's Enforcement Order Conflicts With the Rights of Unfair Labor Practice Strikers As Enunciated By This Court and the Fifth Circuit. It Represents an Incorrect Implementation of a Prior Important Interpretation By This Court of the Act's Section 10(b) 16

II. The Sixth Circuit's Enforcement of the Board's Order Herein Conflicts With a Prior Decision of the Tenth Circuit 23

III. The Sixth Circuit's Enforcement Order Is Offensive to Prior Decisions of this Court Prescribing Conduct To Be Followed Under National Labor Policy, and Is Erroneous 24

Conclusion 29

TABLE OF CASES

Page

A. H. Belo Corp. v. *NLRB*, 5 Cir., 411 F.2d 959, 966 (1969) 19

American Federation of Grain Millers v. *NLRB*, 5 Cir., 197 F.2d 451, 453, fns. 5, 6, (1952) 22

Brooks v. *NLRB*, 348 U.S. 96, 103 ..... 15, 25, 27, 28

Building and Construction Trades Council, etc. (Sullivan Electric Co.), 146 NLRB 1086, 1087 ..... 27, 28

Celanese Corporation of America, 95 NLRB 664, 672, 673 ..... 24, 25

Getreu, etc. v. *District 30, UMW and Local 8280, UMW*, 6 Cir., Case No. 17,555 ..... 8, 15

Greenville Oil Co., 92 NLRB 1033, 1034 22

International Hod Carriers (C. A. Blinne Construction Co.), 135 NLRB 1153, 1156 (1962) 19, 26

International Hod Carriers (Roman Stone Construction Co.), 153 NLRB 659 12

International Ladies' Garment Workers Union v. *NLRB*, 366 U.S. 731 27

Kozan v. *Comstock*, 5 Cir., 270 F.2d 839 19

Ley v. *Simmons*, 249 S.W. 2d 808 (Ky., 1952) 19

Local Lodge No. 1424, Int. Assn. of Machinists, AFL-CIO (Bryan Mfg. Co.) v. *NLRB*, 362 U.S. 411, 414, 416, 417 (1960) 13, 14, 15, 20, 21, 22, 23

Local 8280, UMW (Blue Diamond Coal Co.), Southern Labor Union, Local 188 et al., 65 LRRM 1526, 166 NLRB No. 8 2

Page

Mastro Plastics Corp. v. *NLRB*, 350 U.S. 270, 278 (1956) 17,, 20, 21, 22

Medo Photo Supply Corp. v. *NLRB*, 321 U.S. 678, 684 17

Mission Valley Inn, 140 NLRB 433, 437 27

NLRB v. *American Aggregate Co., Inc.*, 5 Cir., 305 F.2d 559, 562, 563 (1962) 20, 23

NLRB v. *Clausen*, 3 Cir., 188 F.2d 439, 443 (1951) 19

NLRB v. *Gulfmont Hotel Co.*, 5 Cir., 362 F.2d 588, 589 (1966) 24, 25, 27

NLRB v. *Lawrence Typographical Union*, 10 Cir., 376 F.2d 643 (1967) 22

NLRB v. *Mackay Radio and Telegraph Co.*, 304 U.S. 333, 345 21

NLRB v. *MacMillan Ring-Free Oil Co., Inc.*, 9 Cir., 394 F.2d 26 19

NLRB v. *A. E. Nettleton Co.*, 2 Cir., 241 F. 2d 130, 133 19

NLRB v. *Shawnee Industries, Inc.*, 10 Cir., 333 F.2d 221, 224 (1964) 15, 23

NLRB v. *Silver Bakery, Inc., etc.*, 1 Cir., 351 F.2d 37, 39 (1965) 19

National Labor Relations Board, Petitioner v. *District 30, United Mine Workers of America and Local 8280, United Mine Workers of America, Respondents*, 6 Cir., Case No. 18,742 (Decided December 29, 1969), 73 LRRM 2184; Petition

Page

for Rehearing Denied, Jan. 28, 1970 ..... 2, 5, 13, 14, 15, 20, 21, 22, 26, 28

National Packing Co., Inc., 158 NLRB No. 142 18

Philip Carey Mfg. Co. v. *NLRB*, 6 Cir., 331 F.2d 720, 729, 735 ..... 21, 28

Roman Stone [International Hod Carriers, et al. (Roman Stone Construction Co.)], 153 NLRB 659 18

UMW v. *Patton*, 4 Cir., 211 F.2d 742, 746 (1954) 14

STATUTES

28 USCA 1254(1) 3

28 USCA 2101(c) 3

Norris-LaGuardia Act:

Section 4(c) [29 USCA 104(c)] 4, 7

National Labor Relations Act:

Section 7 (29 USCA 157) 4, 11, 17, 24

Section 8(a)(1) [29 USCA 158(a)(1)] 4, 11, 17, 18

Section 8(b)(7) [29 USCA 158 (b)(7)] 18, 27

Section 8(b)(7)(A) [29 USCA 158 (b)(7)(A)] 3, 4, 5, 10, 11, 12, 13, 14, 16, 17, 18, 19, 26, 27

Section 9(c) [29 USCA 159(c)] 4, 13, 14, 17

Section 10(b) [29 USCA 160(b)] 3, 4, 5, 13, 15, 18, 19, 20, 21, 23

Section 10(e) [29 USCA 160(e)] 3, 4, 5

MISCELLANEOUS

Page

"Labor Law Reform—Needed Now", by Wesley M. Wilson, 56 American Bar Journal 248, 250 28

INDEX TO APPENDIX

Appendix A:

Opinion, United States Court of Appeals for the Sixth Circuit entered December 29, 1969 ..... 1a

Order and Judgment, United States Court of Appeals for the Sixth Circuit, granting petition for enforcement 13a

Petition for Rehearing 14a

Order, January 28, 1970, denying rehearing petition 21a

Appendix B:

Decision and Order of the National Labor Relations Board 22a

Trial Examiner's Decision 31a

Appendix C (Statutes):

29 USCA 104(c) 51a

29 USCA 152(3) 51a

29 USCA 157 ..... 52a

29 USCA 158(a) (1) 52a

29 USCA 158(b)(7)(A) 52a

29 USCA 159(c) 53a

29 USCA 160(b) 53a

29 USCA 160(e) 54a

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No._____

DISTRICT 30, UNITED MINE WORKERS OF AMERICA, and LOCAL 8280, UNITED MINE WORKERS OF AMERICA,

Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioners District 30, United Mine Workers of America, and Local 8280, United Mine Workers of America, and each of them, pray that a Writ of Certiorari issue to review (1) the opinion, order and judgment of the

United States Court of Appeals for the Sixth Circuit entered December 29, 1969, in Case No. 18,742, styled *National Labor Relations Board, Petitioner* v. *District 30, United Mine Workers of America, and Local 8280, United Mine Workers of America, Respondents*, wherein the Sixth Circuit enforced an order of the National Labor Relations Board dated June 29, 1967, against petitioners, and each of them (A. 13-14a; B. 28-29a); and (2) the Sixth Circuit's order entered January 28, 1970 denying petitioners' petition for rehearing (A. 21a).[1]

A certified appendix record of the case before the Board, together with proceedings in the Sixth Circuit, is furnished herewith, in accordance with Rules of this Court.

OPINIONS BELOW

The Sixth Circuit's opinion appears in Appendix A hereto (pp. 1-13a), in the certified record and it is reported in 73 LRRM 2184.

The Board's opinion and order, as well as the Trial Examiner's decision, appear in Appendix B hereto (pp. 22-50a), in the certified record (1-31a) and it is reported in 65 LRRM 1526, 166 NLRB No. 8.

JURISDICTION

On December 29, 1969, the Sixth Circuit handed down its decision and opinion and entered its order and judg-

---

[1]Herein the United States Court of Appeals for the Sixth Circuit is called "*Sixth Circuit*". District 30, United Mine Workers of America, and Local 8280, United Mine Workers of America, are called "*District 30*" and "*Local*", respectively, and collectively they are called "*Unions*". National Labor Relations Board is called "Board".

The abbreviations "A." refers to Appendix A and "B." refers to Appendix B to this Petition. Other references (followed by the symbol "a") are to the page numbers of the Appendix which is a part of the certified record filed in this Court's Clerk's office pursuant to Rule 21.

Unless otherwise indicated, all emphases are supplied.

ment that Board's order be enforced. Petitioners' timely petition for rehearing was denied on January 28, 1970, and this Petition for Certiorari is filed within 90 days of that date.

This Court's jurisdiction is invoked under 28 USCA 1254(1) and 2101(c), and Section 10(e) of the National Labor Relations Act, as amended [29 USCA 160(e)] (called "Act").

QUESTIONS PRESENTED

1. Under applicable law and the substantial evidence on the record considered as a whole, did the Sixth Circuit err in holding and in approving the holding of the National Labor Relations Board that Unions, representing unfair labor practice strikers charged by a competing union with picketing in violation of Section 8(b)(7)(A), were precluded in their defense from using evidence concerning the employer's unfair labor practices on the ground that such employer practices were time-barred under Section 10(b) of the National Labor Relations Act, as amended?

2. Is the limitation period of six months contained in Section 10(b) of the National Labor Relations Act, as amended, as to the filing of an unfair labor practice charge, computed from the time a charging party has knowledge of the acts, or from the date of the commission of the acts?

3. Under applicable law and undisputed evidence that United Mine Workers of America held a Board certification that it was the exclusive bargaining representative for employees of Blue Diamond Coal Company, was the Company, when presented with a demand for

recognition by Southern Labor Union as the bargaining agent of its employees, required under applicable law to petition the Board for directions and/or an election to determine which of the competing unions, Southern Labor Union or United Mine Workers of America, in fact was the choice of a majority of its employees?

4. Under applicable law, did the Sixth Circuit err in holding that there was substantial evidence on the record as a whole to support the decision and order of the National Labor Relations Board and in enforcing the Board's order, contrary to the decision, findings and conclusions of the Trial Examiner, that the Unions engaged in picketing prohibited by Section 8(b) (7) (A) of the National Labor Relations Act, as amended?

STATUTES INVOLVED

The pertinent statutory provisions involved are Sections 7, 8(a)(1), 8(b)(7)(A), 9(c), 10(b), and 10(e) of the National Labor Relations Act, as amended [29 USCA 157, 158(a)(1), 158(b)(7)(A), 159(c), 160(b) and (e)] and Section 4, subsection (c) of the Norris-LaGuardia Act [29 USCA 104(c)], which appear in Appendix C hereto, pp. 51a *et seq.*

STATEMENT OF THE CASE

1. Kind of Proceedings

This case reflects a struggle between UMW and Southern Labor Union (SLU) to represent Blue Diamond Coal Company's (Blue Diamond) employees at Leatherwood No. 1 mine who had, by a Board-conducted election in January, 1964, chosen UMW as their exclusive collective bargaining agent; and on January 17, 1964, UMW had been certified as such bargaining agent by Board's Regional Director, Region 9 (41a). Thereafter,

although UMW had not been decertified and without benefit of Board authorization, Blue Diamond recognized SLU Local No. 188 under circumstances hereinafter detailed.

Upon charges filed by SLU under the Act's Section 10(b), a Board agent issued a complaint alleging Unions' picketing constituted unfair labor practices within the Act's Section 8(b)(7)(A); Unions denied the charges (B. 31a); a Board Trial Examiner dismissed the complaint (B. 50a); the Board adopted the Examiner's findings of fact, but rejected his conclusions and dismissal recommendation (B. 22a); it concluded Unions had violated Section 8(b)(7)(A) [B. 28a] and, by order dated June 29, 1967, ordered Unions to cease and desist from picketing, causing to be picketed or threatening to picket Blue Diamond's Leatherwood No. 1 mine under conditions prohibited by Section 8(b)(7)(A) "where an object thereof is forcing or requiring employer to recognize or bargain with them as the collective-bargaining representative of its employees, or forcing or requiring said employees to select or accept" Unions "as their collective-bargaining representative"; and upon Board petition for enforcement of its order under the Act's Section 10(e), the Sixth Circuit granted enforcement (A. 13-14a).

2. The Facts

On January 9, 1964, employees of Blue Diamond's Leatherwood No. 1 mine at a Board-conducted election voted in favor of UMW as their collective bargaining agent. Out of 367 eligible votes, there were 349 ballots cast. 338 were cast for UMW, eleven were challenged ballots and no ballots were cast against UMW (268a). UMW was certified as collective bargaining agent on

January 17, 1964 by Board's Regional Director, Region 9 (41a).

Blue Diamond's employees had been represented by UMW and had worked under UMW contracts since about 1945 (A. 2a). At the time of the election, Blue Diamond was under contract with UMW, and pursuant thereto gave UMW notice of cancellation on February 24, 1964, effective April 27, 1964 (39a). On this date, there were 180 employees on the payroll, *all of whom engaged in a strike* (58a). Bargaining efforts for a successor agreement in six meetings occurring between March 19 and June 25, 1964, resulted in an impasse (39a).

Despite UMW's certification, Blue Diamond refused to bargain except on an individual basis

On August 11, 1964, Blue Diamond by letter notified its employees who had worked at the Leatherwood mine that Blue Diamond was going to reopen its mine and "Jobs will be given to those first returning to work, regardless of whether laid off or working just prior" to April 27, 1964 (314a). The letter did not mention terms of employment under which the employees were to work (314a). Employees, at a meeting, directed Local's officers and committees to contact Blue Diamond's Superintendent Forest to determine terms of employment to be offered employees.

Superintendent Forest admits between 150 and 200 men came to Blue Diamond's office in response to the letter to talk about returning to work (166a). Admittedly, Superintendent Forest advised Local's President and other officers he would talk to them *as individuals but not as a group* (168a, 272a). Blue Diamond conceded his instructions came from its General Manager (168a).

Employees picket Blue Diamond's mine in protest over its refusal to bargain on a group basis

Blue Diamond's Leatherwood mine resumed operations about November 1, 1964 (A. 3a). Local 8280 members began picketing Blue Diamond's Leatherwood No. 1 mine in January, 1965 (302a). This action was taken by Local 8280 after Blue Diamond resumed operations. Local's President explained the reason for the picketing thus: "We had an election and we had chosen" UMW to bargain for us; the jobs belonged to UMW members when the contract expired and "if anybody worked up there we wanted our jobs"; Blue Diamond refused "to talk to us on the letter"; "We had a meeting and we decided that that's the only choice that we had to hold up for our rights was to put a picket line up and see if they'd recognize" the line (274a).

Members were instructed to picket peacefully, to come sober, not have any weapons and not to use any profane language (274a). William Perkins, an International Representative of UMW and a Local member, described the signs carried by members of Local on the picket line as saying, "*. . . on strike, UMWA, Local Union 8280*", and all the signs that he saw were to this effect (295a). Perkins took no part in the picketing; his presence on occasions at the picketing situs was to deliver vouchers as aid to distressed Local members (193a);[2] and local members did not have to take part in the picketing to receive the vouchers (257a, 275-76a, 293a). *There is no evidence that any representative of District 30 engaged*

[2]Such activity is permissive under Norris-LaGuardia's Section 4 (29 USCA 104), Subsection (c) which specifically withholds federal court jurisdiction to issue injunction orders pertaining to "Paying or giving to, or withholding from, any person participating or interested in such labor dispute, any strike or unemployment benefits or insurance, or other moneys or things of value".

in picketing. President C. E. Beane did not learn about the picketing for about a week after it had begun (257a).

Blue Diamond refused to recognize SLU in January, 1965, but agreed to recognize and bargain with it in April, 1965. Within 14-18 hours, Blue Diamond executed a SLU contract.

According to Superintendent Forest, following a telephone call from SLU's representative in the latter part of January, 1965, or the first part of February, 1965, he met with Merl Duncan, Dewey Goodson, Johnnie Joseph and Granville Eversole in Blue Diamond's office as SLU representatives demanding recognition as bargaining agent (161-62a). Duncan was the apparent spokesman for the group (162a; R. 79a).[3] Duncan, an employee, later became President of SLU Local 188 (R. 33a), and Granville Eversole, an employee, became the SLU Local's Secretary-Treasurer (R. 31a) and they later, on May 5, 1965, signed the labor agreement in behalf of SLU Local 188 (315-18a). At the meeting, Forest telephoned Blue Diamond's Toler, who, after talking with Blue Diamond's attorney, advised they did not believe SLU represented a majority of their employees in the unit and for Forest not to recognize them (45a).

No further contact was made by SLU until about April 30, 1965 (45a). At that time, SLU presented what purported to be authorization cards to Blue Diamond (120-125 in number), and on the same day Blue Diamond informed SLU it would recognize it as bargaining

[3]The symbol "R." refers to pagination in an Appendix filed in the Sixth Circuit's Case No. 17,555, styled *Getreu, etc. v. District 30, UMW* and Local 8280, *UMW*, which Appendix has been filed as a part of the certified record in the instant case. Board's brief, as well as UMW's brief in the instant case referred to the Appendix in No. 17,555. The Sixth Circuit's order denying rehearing herein referred to UMW contention based upon facts in Case No. 17,555 (see Appendix A to this Petition, p. 21a).

agent and that they would meet with SLU on May 4 for contract negotiations (164-65a, R. 35a). On the same date, Blue Diamond, through Toler, by letter, advised District 30's President Beane that "Blue Diamond... is convinced that 'UMW' no longer represents a majority of our employees at our Leatherwood Mine" (313a; R. 28a), which Beane received "not more than two days" later (R. 113a), but to which Beane made no reply (R. 112a). *There is no evidence that either Blue Diamond or SLU ever informed Unions that SLU was claiming to represent the employees, or that Blue Diamond had entered into a labor agreement with SLU* (71a; R. 113a, 114a). *District 30's Beane first learned about the contract in November, 1965* (R. 113-14a).

As the Trial Examiner's decision states, Dewey Goodson, a SLU member, obtained several packages of blank designation cards from SLU sometime in January, 1965, which were distributed to Blue Diamond employees and were signed on the job and that in soliciting signatures Goodson told the employees "if there wasn't a union in the plant they would have to quit", which lead the Examiner to find that "Thus there is an unresolved question in the record as to whether the cards represent the uncoerced desires of the signatories" (B. 48a, fn. 18).

Superintendent Forest gave the cards presented to him by SLU to Blue Diamond's office manager Fred Keen (125a), who stated there were 120-125 employees on the payroll in the bargaining unit and after checking the signatures against the personnel record, "Approximately 115 or 116 . . . were authentic" (125a), admitting he returned "four or five of these forms" because "I didn't think that those signatures were accurate" (125a). After Keen checked the cards, they did not

remain in his custody or control and Keen did not, at the hearing, pass upon the authenticity of the signatures appearing upon them. According to Keen, of the 120 or 125 cards examined, 28 had been Blue Diamond employees prior to April 27, 1964—the date when Blue Diamond cancelled its UMW contract—and of the 28, all but 4 were authentic (126a).

Keen testified he possessed no "special training as far as handwriting, reading handwriting ... is concerned" (134a). Some cards bore dates later than April 30, 1965; some cards were of employees whose names did not appear on the employer's April 30 payroll (138-46a).

On *May 4, 1965,* negotiations were commenced between Blue Diamond and SLU. A contract was executed *May 5, 1965* (54a, 55a). In all, the parties negotiated between 14 and 18 hours (55a), and the contract contained the same hours, vacations, wages and welfare fund as that which SLU had negotiated and executed at the Blair Fork mine of Blue Diamond (243a).

Blue Diamond's Toler admitted he was aware of Unions' certification as collective bargaining agent and knew there had been no decertification proceedings (61-63a).

3. The Trial Examiner Dismissed the Complaint Against Unions.

a. The Examiner concluded that picketing was in protest of the Employer's unfair labor practice.

Board's Trial Examiner rejected argument that post-April, 1965 picketing violated the statute, held the General Counsel had failed to establish a violation of the Act's Section 8(b)(7)(A) and dismissed the complaint (B. 50a). He found and concluded (1) the picketing's object was not to compel Blue Diamond to recognize or bargain with UMW *but to protest the company's un-*

fair labor practice committed in August, 1964, when it insisted on individual bargaining with the employees, thereby converting what began as an economic strike into an unfair labor practice strike; (2) during the picketing period UMW retained its status as the currently certified representative of Blue Diamond's employees and therefore its picketing was not within the proscription of Section 8(b)(7)(A);[4] and (3) Blue Diamond's recognition of SLU was necessarily invalid since it occurred while UMW was still the certified representative of the Company's employees and the SLU was a minority union (B. 43a, 44a, 50a, fn. 25).

b. The Examiner rejected General Counsel's argument that Section 10(b)'s six month limitation period precluded consideration of Blue Diamond's unfair labor practices.

The Examiner rejected General Counsel's argument that he "may not consider the unfair character of the picketing because a 'meritorious charge alleging same' has not been filed" (B. 44a). Concluding the striking employees remained unfair labor practice strikers even though no meritorious charge was filed with the Board (B. 45-46a), the Examiner declared, "nothing in the Act . . . limits the period during which unfair labor practice strikers may continue to strike or picket or bars them from a return to work under an unconditional offer" (B. 46a).

c. The Examiner found that the presumption of UMW's major status had not been rebutted by competent evidence.

Declaring a Section 8(b)(7)(A) violation required

[4]Further, concluded the Examiner, "Had the Employer not instituted this policy it seems likely that all employees may have returned to work by April 30, 1965, since their purpose in approaching Superintendent Forest was 'to come back to work' "; and "The policy which was announced and followed during the certification year interfered with, restrained and coerced employees in the exercise of their rights guaranteed by Section 7 of the Act and the Employer thereby violated Section 8(a) (1) of the Act" (B. 43a).

proof that picketing was not on behalf of a labor organization "currently certified as the representative of such employees", the Examiner concluded, "the presumption as to the fact of the majority status by the International created by the certification has not been rebutted by competent evidence" (B. 46-48a), and found of controlling importance that on April 30, 1965 unfair labor practice strikers exceeded the number of returned strikers and striker replacements and that competent credible evidence was lacking to prove a majority of Blue Diamond's employees had designated a union other than UMW as bargaining agent on April 30, 1965 (B. 48a).

4. The Board Adopts the Examiner's Findings But Disagrees With His Conclusions and Recommendations.

The Board adopted Examiner's "relevant findings of fact", but "not his conclusions or recommendations" (B. 22a). Board deemed it "unnecessary and improper to pass upon the Employer's conduct which occurred more than 6 months prior to the filing of the charges herein" and refused to adopt Examiner's statement of the applicable statutory and decisional law, declaring the case controlled by *Int. Hod Carriers, et al. (Roman Stone Construction Co.)*, 153 NLRB 659, and stating, "Accordingly, in the absence of a timely and meritorious charge", Unions "are not entitled to assert any alleged invalidity in the Employer's recognition of SLU as a defense herein" and found they "picketed the Employer after April 30, 1965, at least partially for the purpose of securing recognition and bargaining" and thereby violated the Act's Section 8(b)(7)(A). By order dated June 29, 1967, it ordered Unions to cease and desist from picketing "where an object thereof is forcing or requiring such employer to recognize or bargain with them

as the collective-bargaining representative of its employees, or forcing or requiring said employees to select or accept Respondents as their collective-bargaining representatives" (8a).

5. The Sixth Circuit Agreed With The Board.

The Sixth Circuit, agreeing with Board that "UMW could not employ Blue Diamond's alleged unfair labor practice as a shield when section 10(b) barred its use as a sword", declared, "This determination insulated from attack and thereby validated the company's recognition of the SLU" and therefore Unions' picketing could be regarded only as an effort to compel Blue Diamond to recognize and bargain with UMW (A. 8a), and hence picketing after May 5, 1965 (when the SLU contract was signed) violated Section 8(b)(7)(A) "since it was an attempt to compel the company to recognize and bargain with the UMW at a time when a question concerning representation could not be raised under section 9(c)" [A. 8-9a].

Pointing out Union's contention that Section 10(b) "is a statute of limitations, and not a rule of evidence" (9a), the Sixth Circuit was of opinion that Unions' contention was rejected by this Court's *Local Lodge No. 1424, Int. Assn. of Machinists, AFL-CIO (Bryan Mfg. Co.)* v. *NLRB*, 362 U.S. 411 (1960). The Sixth Circuit negated also Unions' argument of differentiating *Bryan Mfg.* from the instant case "by pointing out that it was not the UMW which filed the complaint and sought to revive legally defunct unfair labor practices" and that Unions "merely sought to 'shed light on the true character of matters occurring within the limitations period' by introducing evidence related to events which transpired

prior to that period", "permissible under the dichotomous test enunciated in *Bryan Mfg.*" (A. 11-12a).

Characterizing these contentions as being "without merit", the Sixth Circuit opined that to permit Unions to invoke Blue Diamond's "putative unfair labor practices . . . as a defense to the unlawful picketing charge would be directly contrary" to *Bryan Mfg.*; that absent reference to events prior to the six months period, SLU was the "lawfully recognized representative" of Blue Diamond's employees; that the Blue Diamond-SLU three-year contract, signed approximately seven months before SLU filed its charges under the Board's contract-bar rules, was not then subject to challenge under the Act's Section 9; and accordingly picketing by UMW members was" 'on the face of things,' illegal under section 8(b)(7)(A); and only by establishing the existence of earlier, time-barred unfair labor practices could the UMW infuse with legality this otherwise illegal conduct" (A. 12a).

Finalizing, the Sixth Circuit declared that if Blue Diamond's conduct "more than six months before the filing of the charges is disregarded, there is substantial evidence in the record considered as a whole to support the Board's finding that the picketing constituted a violation of section 8(b)(7)(A)", as well as Board's finding that Unions "were jointly responsible for this illegal conduct", citing *UMW* v. *Patton*, 4 Cir., 211 F.2d 742, 746 (1954) [A. 13a].

The Sixth Circuit's order granting enforcement of Board's order was entered December 29, 1969 (A. 13-14a).

6. The Sixth Circuit Overruled Union's Rehearing Petition.

In a rehearing petition, Unions emphasized (1) the Sixth Circuit's failure to decide the effect of the secrecy attending Blue Diamond's recognition of SLU in relation to the six-months limitation issue; (2) Unions' brief had noted the SLU contract *was not made public and was kept hidden by the parties and no notice was ever given to District 30 advising that Blue Diamond had contracted with another labor union; (3) that SLU's contract was supposedly entered into at a time when Local 8280 was maintaining its picket line and actively picketing, all of which was based upon record testimony filed in the Sixth Circuit in Case No. 17,555, styled Getreu, etc.* v. *District 30, UMW and Local 8280, UMW,* and showing that District 30 received no notice of Blue Diamond's bargaining with another labor union until "somewhere in November of 1965" and that immediately after learning of the SLU contract charges were filed but Board agents refused to issue a complaint;[5] and (4) that the Tenth Circuit's *NLRB* v. *Shawnee Industries, Inc.,* 333 F.2d 221, 224 (1964) *agreed "with the Board that the limitation period begins when the facts of a discriminatory hiring policy first become known to an applicant".*

The rehearing petition (A. 14-21a) noted the Sixth Circuit's failure to decide when the six months limitation period began to run as to SLU's recognition in view of the secrecy surrounding its recognition and its ignoring this Court's rule in *Brooks* v. *NLRB,* 348 U.S. 96, 103, that "If an employer has doubts about his duty to continue bargaining, it is his responsibility to petition the

[5]These assertions appear in Unions' brief, pp. 6-7, fn. 9.

Board for relief, while continuing to bargain in good faith . . . until the Board has given some indication that his claim has merit". The rehearing petition emphasized that had the Board issued a complaint pertaining to UMW's charge concerning Blue Diamond's recognizing SLU when requested by UMW, the entire matter could have been fully explored, and *Brooks* would have caused the Board to examine the facts as they existed in connection with UMW's assertion of an unfair labor practice regarding Blue Diamond's recognition of SLU (A. 20a).

On January 28, 1970, an order of the Sixth Circuit denied the rehearing petition, noting however, that "the contentions therein were made in the petitioner's original brief and were considered previously by the court and rejected (although without express mention in the opinion)" [A. 21a].

REASONS FOR GRANTING THE WRIT

I. THE SIXTH CIRCUIT'S ENFORCEMENT ORDER CONFLICTS WITH THE RIGHTS OF UNFAIR LABOR PRACTICE STRIKERS AS ENUNCIATED BY THIS COURT AND THE FIFTH CIRCUIT. IT REPRESENTS AN INCORRECT IMPLEMENTATION OF A PRIOR IMPORTANT INTERPRETATION BY THIS COURT OF THE ACT'S SECTION 10(b).

Section 8(b)(7)(A) of the Act [29 USCA 158(b)(7)(A)] provides it shall be an unfair labor practice for a labor organization or its agent . . .

"(7) to picket or cause to be picketed, or threaten to picket or cause to be picketed, any employer where an object thereof is forcing or requiring an employer to recognize or bargain with a labor organization as the representative of his employees, or forcing or requiring the employees of an employer to accept or select such labor organization as their collective bargaining repre-

sentative, *unless such labor organization is currently certified as the representative of such employees:*

"(A) where the employer has *lawfully recognized* in accordance with this subchapter any other labor organization and a question concerning representation may not appropriately be raised under section 159(c) of this title."

Neither the Board nor the Sixth Circuit challenged the Examiner's conclusions (B. 43-44a) that "picketing . . was to protest the Employer's insistence upon individual bargaining with the employees who had ceased to work", a policy announced and followed not only during the certification year but throughout the periods herein involved, and interfered with, restrained and coerced employees in the exercise of their Section 7 rights, by reason whereof Blue Diamond violated the Act's Section 8(a)(1), consonant with this Court's *Medo Photo Supply Corp.* v. *NLRB*, 321 U.S. 678, 684. Indeed, in adopting the Examiner's relevant "findings of fact" (B. 22a), the Board accepted the Examiner's finding that Blue Diamond was guilty of an unfair labor practice.

Nor do the Board and the Sixth Circuit quarrel with the Examiner's conclusion (B. 44-46a) that since an object of the picketing was to protest Blue Diamond's unfair labor practices, the picketing was a protected right until such time as those practices were remedied and was not proscribed by Section 8(b)(7)(A), did not fall within its proscriptions and could not be enjoined; and, under *Mastro Plastics Corp.* v. *NLRB*, 350 U. S. 270, "Unfair labor practice strikers 'do not lose their status and are entitled to reinstatement . . . even if replacements for them have been made' ".

Sixth Circuit and Board disagreement with the Trial Examiner appears in their agreement that it was improper to pass upon Blue Diamond's conduct which occurred more than six months prior to the filing of the charges herein by SLU (A. 9-12a; B. 22, 25-26a).

However, the Act's Section 10(b) [29 USCA 160(b)] provides, in part, that "No complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, . . ."; and neither the Sixth Circuit nor the Board disputed the Trial Examiner's averments (B. 45a) that he "finds nothing in the Act or in the legislative history of the Act where the intent is expressed that unfair labor practice strikers shall be ousted from their right to continue peaceful picketing against unremedied unfair labor practices or that they shall lose their status as unfair labor practice strikers because a 'meritorious charge' alleging unfair labor practices has not been filed with the Board, where, as here competent and undisputed evidence established that unfair labor practices have been committed against which the picketing is directed" and "Indeed in National Packing Company, Inc., (158 N.L.R.B. No. 142) the . . Employer was allowed to urge a Section 8(b)(7) defense against an alleged Section 8(a)(1) violation although it did not appear that a meritorious charge had been filed alleging a violation of Section 8(b)(7)".

Board's reliance upon *Roman Stone* [*International Hod Carriers, et al.* (*Roman Stone Construction Co.*), 153 NLRB 659] (A. 26a), ignores that in *Roman Stone* the union guilty of violating Section 8(b)(7)(A) *was not*

certified to represent company employees who had been represented by another union for several years under an existent contract at the time the guilty union demanded recognition and began picketing. Factually, the instant situation differs in that UMW had been certified as Blue Diamond employees' exclusive bargaining representative. Indeed, NLRB has held that Section 8(b)(7)(A)'s picketing ban has no applicability if the union "is currently certified as" exclusive bargaining representative. See *International Hod Carriers (C. A. Blinne Construction Co.)*, 135 NLRB 1153.

The First, Second, Third, Fifth and Ninth Circuits[5] hold that Section 10(b) is, as stated by the Fifth Circuit, "meant to be and is no more than an ordinary statute of limitations" (411 F.2d 966). The Sixth Circuit's enforcement of the Board's order overlooks the crucial legal principle that even though no timely charge was filed, this would do no more than operate on the *remedy* and *would not extinguish the right*. Both Federal and Kentucky law so proclaim. *Kozan* v. *Comstock*, 5 Cir., 270 F.2d 839; *Ley* v. *Simmons*, 249 S.W.2d 808 (Ky., 1952). At most, failure to complain to the Board of Blue Diamond's admitted unfair labor practice conduct would do no more than preclude Board's processing an unfair labor practice charge against Blue Diamond. *It would not destroy the fact that Blue Diamond committed the unfair labor practice insofar as its striking employees were concerned.* It would not change the *status* of the strikers or affect the *continuing* right of the striking employees, *as unfair labor practice strikers,*

[5]*NLRB* v. *Silver Bakery, Inc., etc.*, 1 Cir., 351 F.2d 37, 39 (1965); *NLRB* v. *A. E. Nettleton Co.*, 2 Cir., 241 F.2d 130, 133; *NLRB* v. *Clausen*, 3 Cir., 188 F.2d 439, 443 (1951); *A. H. Belo Corp.* v. *NLRB*, 5 Cir., 411 F.2d 959 (1969); *NLRB* v. *MacMillan Ring-Free Oil Co., Inc.*, 9 Cir., 394 F.2d 26.

to have the benefit of this Court's *Mastro* principle that unfair labor practice strikers 'do not lose their status and are entitled to reinstatement, . . . even if replacements for them have been made' ", and that "where an economic strike has been converted into an unfair labor practice strike, as in the instant case, an employer is likewise obligated to reinstate 'unfair labor practice striking employees upon their unconditional offers to return to work' ", as the Examiner declared (B. 44a).

The Fifth Circuit's *NLRB* v. *American Aggregate Co.*, 305 F.2d 559 (1962) rejected employer argument that Section 10(b) excluded evidence of "occurrences that led up to and caused the strike *or which contributed to its continuation* is necessarily barred by" Section 10(b), implemented *Mastro* and recognized that "when a strike is brought about by unfair labor practices of an employer the returning strikers are entitled to be reinstated to their former or substantially equivalent employment upon their unconditional request" and held that though Section 10(b) *"bars charges"*, it *"does not bar evidence"* (pp. 562-63). As the Fifth Circuit declared, it is the *strikers' status* which entitles them to different treatment (p. 563).

The Sixth Circuit supports its affirmance of the Board by *Local Lodge No. 1424, Int. Assn. of Machinists, AFL-CIO (Bryan Mfg. Co.)* v. *NLRB*, 362 U.S. 411 (1960), wherein the majority opinion recites that, "It is doubtless true that §10(b) does not prevent all use of evidence relating to events transpiring more than six months before the filing and service of an unfair labor practice charge" and that "where occurrences within the six-month limitations period in and of themselves may constitute, as a substantive matter, unfair labor practices",

then "earlier events may be utilized to shed light on the true character of matters occurring within the limitations period; and for that purpose §10(b) ordinarily does not bar such evidentiary use of anterior events" (p. 416). While the majority opinion rejects the admission of evidence "where a complaint based upon that earlier event is time-barred" (p. 417) because to do so would result in reviving a legally defunct unfair labor practice, use of the evidence pertaining to Blue Diamond's unfair labor practice in the instant situation would not be for the purpose of "reviving a legally defunct unfair labor practice" *but would be used to protect unfair labor practice strikers in the pursuit of rights accorded* them by the Act as professed by *Mastro-Plastic Corp.*, 350 U.S. 278 and *Philip Carey Mfg. Co.* v. *NLRB*, 6 Cir., 331 F.2d 720, 729, holding unfair labor practice strikers" do not lose their status and are entitled to reinstatement with back pay, even if replacements for them have been made" upon their unconditional offers to return to work. Moreover, as the Examiner appropriately noted (B. 45a, fn. 13):

> "In *N.L.R.B.* v. *Mackay Radio and Telegraph Co.*, 304 U.S. 333, 345, the Supreme Court said:
>
> > 'Within this definition [Section 2(3) of the Act] the strikers remained employees for the purpose of the Act and were protected against unfair labor practices denounced by it.' "

Local Lodge No. 1424's inapplicability to the instant situation appears in the facts that Unions herein were not the complaining party to initiate the instant proceeding and the case did not, as does this case, involve the rights of unfair labor practice strikers; and in addition, the Sixth Circuit's enforcement order ignores the fact that to render *Local Lodge No. 1424* apposite, the

status of unfair labor practice strikers would of necessity have to revert to that of economic strikers, which militates against judicial recognition that unfair labor practice strikers have a *preferred status* in the processing of the Act. A further reason for *Local Lodge No. 1424's* inapplicability is discussed (post, p. 28).

The Sixth Circuit's position is not supported by *NLRB* v. *Lawrence Typographical Union*, 10 Cir., 376 F.2d 643 (1967), which rejected evidence of a time-barred unfair labor practice charge because such testimony *was inappropriate in representation proceedings* and the union had been afforded adequate opportunity to challenge election before it was found guilty of violating the Act by recognitional picketing. Nor is *American Federation of Grain Millers* v. *NLRB*, 5 Cir., 197 F.2d 451, 453, fns. 5, 6 (1952) apposite, since its sanction was of a Board order which held, "In view of the fact that the strikers had been permanently replaced before June 18, 1948, and that there was no showing of any vacancies available for them when they applied for reinstatement, this refusal did not constitute an unfair labor practice unless it could be shown that they had become unfair labor practice strikers *before*[4] being replaced", "they were economic strikers who took their chances on being replaced" and "Only if they can show that their strike was caused or prolonged by unfair labor practices are they entitled to preferred treatment". *Greenville Oil Co.*, 92 NLRB 1033, 1034. Moreover, *Grain Millers* antedated this Court's *Mastro*, decided in 1956, which proclaimed the right of unfair labor practice strikers to reinstatement, and thus renders the Sixth Circuit's reliance on *Grain Millers* of dubious value. Significantly, the Sixth Cir-

[4]Emphasis appears in the Board's opinion.

cuit's opinion recognizes the contrary view expressed in the Fifth Circuit's *American Aggregate* case [305 F.2d 559 (1962)].

Heretofore, this Court granted certiorari "because of the importance" of the Act's Section 10(b) "in the proper administration of the National Labor Relations Act". *Local No. 1424* (362 U.S. 411, 414). The instant case demonstrates the conflict in the Circuits as to the proper interpretation to be given Section 10(b). This conflict, and additionally the problem posed in Reason 2 (*post*, p. 23), invite this Court's award of certiorari herein.

II. THE SIXTH CIRCUIT'S ENFORCEMENT OF THE BOARD'S ORDER HEREIN CONFLICTS WITH A PRIOR DECISION OF THE TENTH CIRCUIT.

Unions were not knowledgeable of SLU's claim to represent Blue Diamond's employees or Blue Diamond's execution of a SLU labor agreement until November, 1965, which was not within the six months limitation period of the Act's Section 10(b) [29 USCA 160(b)], and immediately upon learning thereof charges were filed but *Board agents refused to issue a complaint* (*ante*, p. 15). In *NLRB* v. *Shawnee Industries, Inc.*, 10 Cir., 333 F.2d 221, 224 (1964), the Tenth Circuit agreed "with the Board that the limitation period begins when the facts of" an unfair labor practice "first become known" to a charging party.

Under undisputed evidence, the Sixth Circuit's enforcement of the Board's order and denial of the rehearing petition stand in sharp conflict with *Shawnee* and, if permitted to stand, mean that an employer guilty of an unfair labor practice and its favored union may

surreptitiously conceal clandestine bargaining from a Board-certified collective bargaining agent so as to preclude the filing of unfair labor practice charges within the limitation period, and enables the Board itself to use its refusal first to issue a complaint on charges filed within the limitation period and thereafter, inconsistently, to deprive the certified union to use defensively the employer's unfair labor practices.

III. THE SIXTH CIRCUIT'S ENFORCEMENT ORDER IS OFFENSIVE TO PRIOR DECISIONS OF THIS COURT PRESCRIBING CONDUCT TO BE FOLLOWED UNDER NATIONAL LABOR POLICY, AND IS ERRONEOUS.

At the time of UMW certification on January 17, 1964, 367 employees had voted for UMW and no employees had voted against it. Ever since 1951, NLRB has adhered to its *Celanese Corporation of America*, 95 NLRB 664, 672, rule that *"absent unusual circumstances the majority status of a certified union is presumed to continue for 1 year from the date of certification" and that even after the first year of a Board certification has elapsed, the certification still creates a presumption, though rebuttable, as to the fact of majority status by the certified union.*

Despite UMW certification, Blue Diamond adopted a policy which persisted, as the Examiner found (B. 24a), from August 11, 1964 until April 30, 1965, of negotiating with its employees on an individual basis. Not only did Blue Diamond's policy occur within the certification year when UMW's "majority status is irrebuttably presumed" [*NLRB* v. *Gulfmont Hotel Co.*, 5 Cir., 362 F.2d 588, 589 (1966)] but Blue Diamond's refusal to negotiate and bargain collectively conflicted with employees' rights under the Act's Section 7 "to bargain collectively through representatives of their own choos-

ing", thereby impressing them with the status of unfair labor practice strikers.

The Board's *Celanese* (95 NLRB 673) avowed an employer's good faith questioning of a union's majority had to be answered "in the light of the totality of all the circumstances involved" and that *"the majority issue must not have been raised by the employer in a context of illegal antiunion activities, or other conduct by the employer aimed at causing disaffection from the union."* Here, argument that Blue Diamond had reasonable basis to doubt UMW's continued majority representation of employees must be evaluated in light of its own activity to dissipate UMW's majority by refusing to bargain collectively *during the certification year* when it rejected collective bargaining and adamantly adhered to its initiated and continuing policy of bargaining only on an *individual basis.*

Brooks v. *NLRB,* 348 U.S. 96, 103, provided a guideline for Blue Diamond: *"If an employer has doubts about his duty to continue bargaining, it is his responsibility to petition the Board for relief,* while continuing to bargain in good faith at least *until the Board* has given some indication that his claim has merit." The Sixth Circuit ignored *Brooks* (*ante,* p. 15).

Gulfmont Hotel Co. (362 F.2d 588), consonant with *Brooks,* declared, "we think it can be fairly stated that *any doubt as to the continuing majority status must rest on a reasonable basis and may not depend solely upon unfounded speculation or a subjective state of mind"* and that the employer must have *"a reasonable basis" for believing that majority support of the bargaining union no longer existed* (p. 589). When SLU cards were presented to Blue Diamond on April 30, 1965, SLU cards numbered

approximately 118, which was far less than one-half of the 338 employees (*ante*, p. 5) who had designated UMW as their exclusive bargaining representative. The alacrity with which Blue Diamond evidenced its willingness to accept SLU as bargaining agent for its employees beclouds its having a reasonable or good faith basis upon which to predicate a belief that UMW's certification status was no longer existent.

As shown (*ante*, p. 12), the Examiner concluded "the presumption as to the fact of the majority status by" UMW "created by the certification has not been rebutted by competent evidence, *finding on April 30, 1965 unfair labor practice strikers exceeded returned strikers and striker replacements, and competent credible evidence is lacking to show a majority of Blue Diamond's working employees had designated a labor union other than UMW as bargaining agent on April 30, 1965.* Examiner found, upon the record as a whole, Board's General Counsel's proof insufficient to rebut the presumption as to the fact of such majority status and that UMW was "currently certified" as representative on April 30, 1965 (B. 50a). *Notably, Board adopted the Examiner's "relevant findings of fact"* (B. 22a).

The Sixth Circuit's conclusion (A. 13a), "If the conduct engaged in by Blue Diamond more than six months before the filing of the charges is disregarded, there is substantial evidence in the record considered as a whole to support the Board's finding that the picketing constituted a violation of Section 8(b)(7)(A)" is a *non sequitur* and erroneous since, as the Examiner found and Board agreed (*ante*, p. 12), UMW's majority status was never dissipated, the Board itself holds in *International Hod Carriers (C. A. Blinne Construction Co.)*, 135 NLRB 1153, 1156 (1962): "A 'currently certified' union may picket

for recognition or organization of employees for whom it is certified" and "The prohibitory provisions of Section 8(b)(7) do not encompass picketing which is solely in protest against unfair labor practices". ***Mission Valley Inn,*** 140 NLRB 433, 437.

Blue Diamond's adherence to the Supreme Court's teaching in *Brooks* (348 U.S. 103) should have sent it to the Board if it had "fair doubt about" UMW's continuing majority. Instead, it preferred "unfounded speculation", a "subjective state of mind", and a choice of SLU which the Fifth Circuit's *Gulfmont Hotel Co.* (362 F.2d 589) condemns. The invalidity of Blue Diamond's recognition of SLU and its execution of the agreement with that union is made crystal clear by the ruling in *International Ladies' Garment Workers' Union* v. *NLRB,* 366 U.S. 731, that a collective bargaining agreement by which an employer, accepting a union's erroneous claim that the union represents a majority of the employer's employees, unlawfully recognizes the union as the employees' exclusive bargaining representative, is invalid even as to those of the employees whom the union in fact represents.

Moreover, the Sixth Circuit's finding of substantial evidence that the picketing constituted an 8(b)(7)(A) violation is challenged by *Building and Construction Trades Council, etc. (Sullivan Electric Co.),* 146 NLRB 1086, 1087, where the Board declared the statutory words "recognize or bargain" were *"intended to proscribe picketing having as its target forcing or requiring an employer's initial acceptance of the union as the bargaining representative of his employees"* and that "When viewed in this posture, it is clear that Sullivan *had recognized and extended bargaining rights to the Respondents long before the disputed picketing commenced*

here and that such picketing therefore was not designed to attain those statutory objectives." So, UMW's certification herein brings the instant case clearly within *Sullivan's* rule.

The Sixth Circuit's opinion concedes, "If the unfair labor practice strikers were included in the unit, it is apparent that the SLU had not obtained enough authorization cards to achieve majority status, since the number of unfair labor practice strikers exceeded the combined number of returned strikers and striker replacements" (A. 6a). *Philip Carey Mfg. Co., etc.* v. *NLRB*, 6 Cir., 331 F.2d 735, professes that "the interests to be protected are primarily those of the employees . ." Certainly the Act's purpose is not served by enforcing an order *subordinating the rights of employees under a Board certification* to give preference to an employer-favored union whose existent status derives from an employer's calculated unfair labor practice and its violation of this Court's mandate in Brooks, coupled with a joint determination by Blue Diamond and SLU to keep from the certified agent knowledge of their negotiations and contract, when compliance with *Brooks* would have afforded employees the right of self-determination as to which of the competing unions they preferred. The favored position accorded SLU by the Sixth Circuit and the Board stems clearly from Blue Diamond's willingness to avoid this Court's mandate in *Brooks*. The Sixth Circuit's enforcement order stands as a pattern to other employers to violate this Court's mandate. National labor policy is thus thwarted.[7]

---

[7]See article by Wesley M. Wilson, styled "Labor Law Reform—Needed Now," in 56 American Bar Journal 248, 250, where the author urges that recognition of a new union by an employer should be only after the new union wins an NLRB secret ballot election. This would have been achieved had Blue Diamond pursued *Brooks'* guidance.

CONCLUSION

For the reasons assigned, Petitioners, and each of them, pray that this Petition for Writ of Certiorari should be granted. Petitioners intend to urge each of the points and questions raised, though not argued herein.

Respectfully submitted,

EDWARD L. CAREY
HARRISON COMBS
WILLARD P. OWENS
900 Fifteenth Street, N. W.
Washington, D. C. 20005

H. B. NOBLE
304 Main Street
Hazard, Kentucky 41701

GRANT KNUCKLES
Asher Building
Virginia Avenue
Pineville, Kentucky 40977

M. E. BOIARSKY
512 Kanawha Valley Building
Charleston, West Virginia 25301
Attorneys for Petitioners

April 27, 1970

APPENDICES

Appendix A

Filed December 29, 1969

No. 18,742

United States Court Of Appeals

FOR THE SIXTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD, *Petitioner,* v. DISTRICT 30, UNITED MINE WORKERS OF AMERICA, AND LOCAL 8280, UNITED MINE WORKERS OF AMERICA, *Respondents.*	ON PETITION for Enforcement of an Order of the National Labor Relations Board.

Decided December 29, 1969.

Before: O'SULLIVAN, PECK, and MCCREE, Circuit Judges.

MCCREE, Circuit Judge. The National Labor Relations Board seeks enforcement of its order requiring respondents, a district organization (District 30) and a local organization (Local 8280) of the United Mine Workers of America, to cease and desist from certain unfair labor practices and to post appropriate notices. The Board's Decision and Order are reported at 166 NLRB No. 8 (1967).

On January 17, 1964, the United Mine Workers (hereinafter UMW) was certified as the collective bargaining representative of the production and maintenance employees at Blue Diamond Coal Company's Leatherwood No. 1 mine located near Leatherwood, Kentucky.[1] Thereafter, on February 24, 1964, Blue Diamond served on respondents a 60 day notice of termination of the existing contract,[2] and negotiations for a new contract commenced. The parties bargained to an impasse on economic issues and, when the existing contract expired on April 27, 1964, all the employees ceased working at the mine.

On August 11, 1964, Blue Diamond notified the striking employees by letter that those employees who had not returned to work by August 24 would be permanently replaced. Shortly after receiving this letter, approximately 200 employees appeared at the company's premises. The local president and three committeemen emerged from the group and informed the mine superintendent that they wanted to discuss their jobs and the possibility of returning to work. The superintendent, acting on the instructions of the company's vice-president, replied that he would "talk to them as individuals, but not as a group." After reporting this response to the employees, the union representatives advised the superintendent that this was unacceptable, and the employees departed.

---

[1]The United Mine Workers had been the recognized representative of Blue Diamond's employees since about 1945 and had entered into a series of open-end contracts with the company. A petition for an election was filed in November, 1962, and an election was conducted in September, 1963. The UMW won the election by a vote of 338-0, and subsequently was certified as the employees' bargaining representative by the Regional Director.

[2]This contract had been executed prior to certification of the UMW. *See* n. 1, *supra*.

Blue Diamond resumed mining operations in November, 1964 with a work force of approximately 120 men, about 28 of whom were former employees who had been rehired. On January 19, 1965, the UMW responded by instituting a picket line at the mine. The picketing continued, with one interruption, until it was enjoined in a section 10(1) proceeding on July 13, 1963.[3]

At about the same time the UMW began picketing the mine, the Southern Labor Union (hereinafter SLU) requested recognition as the collective bargaining representative of the employees hired by the company to reopen the mine. The company declined on the ground that the SLU did not represent a majority of these employees. However, the SLU continued its organizational efforts and, on April 30, 1965, presented 120 signed authorization cards to officers of the company and again requested recognition. After its office manager had authenticated the validity of the signatures on 115 of the cards, Blue Diamond advised the SLU that it would

---

[3]Section 10(1), 29 U.S.C. § 160(1), provides, in pertinent part:

> Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of . . . section 158(b)(7) [unlawful recognitional picketing by a labor organization] of this title, the preliminary investigation of such charge shall be made forthwith . . . . If, after such investigation, the officer or regional attorney to whom the matter may be referred has reasonable cause to believe such charge is true and that a complaint should issue, he shall, on behalf of the Board, petition any United States district court within any district where the unfair labor practice in question has occurred, . . . for appropriate injunctive relief pending the final adjudication of the Board with respect to such matter. Upon the filing of any such petition the district court shall have jurisdiction to grant such injunctive relief . . . as it deems just and proper, notwithstanding any other provision of law . . . .

Charges against the UMW, alleging a violation of section 8(b)(7)(A) of the National Labor Relations Act, as amended, 29 U.S.C. § 158(b)(7)(A), had been filed on December 7, 1965. Although the UMW appealed the grant of the Section 10(1) injunction to this court, the appeal was mooted by the Board's order requiring respondents to cease and desist from the picketing and it was therefore dismissed.

accede to the request for recognition.[4] Five days later, the company and the SLU signed a collective bargaining agreement.

After representing the employees at Leatherwood No. 1 for about seven months, during which time the picketing by the UMW continued unabated, the SLU filed unfair labor practice charges with the Board alleging that the UMW was engaging in recognitional picketing in violation of section 8(b)(7)(A) of the National Labor Relations Act, as amended, 29 U.S.C. § 158(b)(7)(A). A complaint was issued and in August, 1966, a hearing was conducted by a Trial Examiner.

Section 8(b)(7)(A) provides:

> It shall be an unfair labor practice for a labor organization or its agent—
>
> * * *
>
> (7) to picket or cause to be picketed, or threaten to picket or cause to be picketed, any employer where *an object thereof is forcing or requiring an employer to recognize or bargain with a labor organization* as the representative of his employees, or forcing or requiring the employees of an employer to accept or select such labor organization as their collective bargaining representative, *unless such labor organization is currently certified as the representative of such employees:*
>
> (A) where the employer has *lawfully recognized* in accordance with this Act any other labor organization and a question concerning representation may

---

[4]On the same day that the company recognized the SLU, its vice-president wrote a letter to the president of the District 30 organization informing him:

> You are hereby notified that Blue Diamond Coal Co. is convinced that United Mine Workers of America no longer represents a majority of our employees at our Leatherwood Mine, Leatherwood, Perry Co., Ky.

not appropriately be raised under Section 9(c) of this Act (italics added by Trial Examiner).

The Trial Examiner, relying on the italicized portions of the statute, held that the General Counsel had failed to establish a violation and dismissed the complaint. He found that the object of the picketing was not to compel Blue Diamond to recognize or bargain with the UMW, but to protest the company's unfair labor practice committed in August, 1964, when it insisted on individual bargaining with the employees. Accordingly, he concluded that the picketing was not for the purpose proscribed by section 8(b)(7)(A). The Trial Examiner also found that during the period of picketing, the UMW retained its status as the currently certified representative of Blue Diamond's employees, and that for this reason, too, its picketing was not within the proscription of section 8(b)(7)(A). Finally, the Trial Examiner concluded that Blue Diamond's recognition of the SLU was necessarily invalid since it occurred while the UMW was still the certified representative of the company's employees and the SLU was a minority union.[5]

The critical finding in the Trial Examiner's decision was his determination that the company committed an unfair labor practice when it refused to bargain with the employees' chosen representatives and insisted on separate negotiations with each employee. It was this unfair labor practice which converted what began as an economic strike into an unfair labor practice strike and enabled the Trial Examiner to find that the purpose of the picketing was to protest the unfair labor practice. Also, it was this unfair labor practice which

---

[5]The Trial Examiner also questioned the legitimacy of the company's recognition of the SLU on the ground that the validity of the signatures on the authorization cards had not been properly established.

created a right to reinstatement on the part of the striking employees and, in turn, permitted the findings by the Trial Examiner that, during the picketing, the UMW was the certified representative of Blue Diamond's employees and that recognition of the SLU was invalid. He reasoned that since unfair labor practice strikers are entitled to reinstatement, the striking employees had to be included in the bargaining unit for the purpose of determining the number of employees from whom the SLU had to obtain authorization cards in order to achieve majority status[6] and to rebut the presumption of majority status enjoyed by the UMW because of its earlier certification.[7] If the unfair labor practice strikers were included in the unit, it is apparent that the SLU had not obtained enough authorization cards to achieve majority status, since the number of unfair labor practice strikers exceeded the combined number of returned strikers and striker replacements.[8] Thus, the Trial Examiner concluded that the presumption of majority status enjoyed by the UMW had not been rebutted, and the UMW retained its representative status during the picketing.

---

[6]*See Mastro Plastics Corp.* v. *N.L.R.B.*, 350 U.S. 270, 278 (1956). If the striking employees had remained economic strikers, they would not have been included in the bargaining unit as of April 30, 1965 (the date of recognition of the SLU), since by that date the strike would have been in progress for more than twelve months. *See* Section 9(c)(3) of the National Labor Relations Act, as amended, 29 U.S.C. § 159(c)(3).

[7]Under the Board's rules, a union's majority status is irrebuttably presumed for a period of one year following certification as the employees' bargaining representative. After the first year, the presumption remains, but it is rebuttable. *Celanese Corp. of America*, 95 NLRB 664, 671-72 (1951). *See N.L.R.B.* v. *Gulfmont Hotel Co.*, 362 F.2d 588, 589 (5th Cir. 1966); *N.L.R.B.* v. *Kaase Baking Co.*, 346 F.2d 24, 30-32 (6th Cir. 1965).

[8]About 180 employees went on strike in April, 1964. If the 28 employees who returned to work in November, 1964 are subtracted from this number, it still exceeds the total of 120 employees who were used to reopen the mine and subsequently were organized by the SLU.

At the hearing, the General Counsel contended that despite the undisputed evidence of the company's refusal to negotiate with the employees' representatives, the Trial Examiner was precluded from attaching any significance to this putative unfair labor practice because the UMW had failed to file a meritorious charge challenging the company's conduct within the six month period of limitations prescribed in section 10(b) of the National Labor Relations Act, as amended, 29 U.S.C. § 160(b). The Trial Examiner disagreed and held that the failure to file a meritorious charge did not preclude the introduction of *evidence* of the company's unfair labor practice and the union's reliance on this conduct as a *defense* to the alleged violation of section 8(b)(7)(A).

The Board, relying on its decision in *Roman Stone Construction Co.*,[9] reversed the Trial Examiner and held that it was "improper to pass upon the Employer's conduct which occurred more than 6 months prior to the filing of the charges" by the SLU. In *Roman Stone*, the Board held that when the filing of a charge contesting the validity of a company's recognition of a union is barred by the six month period of limitations of section 10(b), another union cannot invoke the claimed invalidity as a defense to an alleged violation of section 8(b)(7)(A). The Board concluded that to hold otherwise would enable the union which asserted the stale claim in defense of its picketing to circumvent the limitations requirement and to defeat the stability in bargaining relationships which that provision was designed to further. It would permit the union to accomplish by means of picketing something

---

[9] *International Hod Carriers' Building & Common Laborers' Union of America, Road & Heavy Construction, Local 1298, and Roman Stone Construction Co., etc.*, 153 NLRB 659 (1965).

it could no longer accomplish under established Board procedures.

Based on its holding in *Roman Stone*, the Board determined that the UMW could not employ Blue Diamond's alleged unfair labor practice as a shield when section 10(b) barred its use as a sword. This determination insulated from attack and thereby validated the company's recognition of the SLU.[10] Under the Board's contract-bar rules, the contract signed shortly after this "lawful" recognition precluded other labor organizations, including the UMW, from raising a question concerning representation during the period of this contract. *See N.L.R.B.* v. *Local 3, International Brotherhood of Electrical Workers*, 362 F.2d 232, 236 (2d Cir. 1966). Moreover, since the UMW was barred from availing itself of the effect of Blue Diamond's conduct in August, 1964, its picketing could not be regarded as protesting an unfair labor practice and therefore could be regarded only as an effort to compel the company to recognize and bargain with the UMW. Accordingly, the Board concluded that after May 5, 1965 (the date the collective bargaining agreement was signed), the picketing by the UMW violated section 8(b)(7)(A), since it was an attempt to compel the company to recognize and bargain with the

---

[10]Once it was decided the strikers could not invoke the company's putative unfair labor practice as a defense, this necessarily meant they remained economic strikers throughout the period of the strike. As economic strikers, they were no longer a part of the bargaining unit on April 30, 1965 (the date of recognition of the SLU). *See* n. 6, *supra*. Accordingly, the SLU had obtained authorization cards from a majority of the employees *in the bargaining unit* as of April 30, 1965, and, on the basis of the authorization cards, it became the lawfully recognized bargaining agent of *those* employees. *See N.L.R.B.* v. *Gissel Packing Co.*, 395 U.S. 575 (1969).

UMW at a time when a question concerning representation could not be raised under section 9(c)."

In opposing the Board's petition for enforcement, respondents contend that the Trial Examiner correctly concluded that the failure to file timely charges challenging Blue Diamond's refusal to bargain or its recognition of the SLU affect only the availability of a remedy for these unfair practices. The limitations bar does not require the Board to ignore the practices to the extent they may be relevant as evidence in the section 8(b)(7)(A) proceeding initiated by the SLU. In other words, respondents contend that section 10(b) is a statute of limitations, and not a rule of evidence.

This same contention was presented to the Supreme Court in *Local Lodge No. 1424, International Assoc. of Machinists, AFL-CIO, et al. (Bryan Mfg. Co.)* v. *N.L.R.B.*, 362 U.S. 411 (1960). In *Bryan Mfg.* the union and the company had committed a putative unfair labor practice by signing a collective bargaining agreement which contained a union security clause at a time when the union did not represent a majority of the company's employees. More than six months after the execution of this agreement a complaint was filed against the union and the company. They defended the action on the ground that it was barred by the limitations proviso of section 10(b). The Board rejected the defense and held that the union and the company had committed an independent unfair

---

"It should be noted that Section 8(b)(7)(A) does not protect only bargaining relationships established as a result of an election and subsequent certification of a union. It also "affords protection to lawfully recognized unions which do not have certified status," *International Hod Carriers' Building and Common Laborers' Union of America, Local 840, and Blinne Construction Co.*, 135 NLRB 1153, 1156 n. 5, (1962), and therefore would be applicable to a bargaining relationship entered into on the basis of authorization cards. *See N.L.R.B.* v. *Gissel Packing Co.*, 395 U.S. 575 (1969).

labor practice by their continued *enforcement* of the agreement (which occurred within the six-month period preceding the filing of the complaint). Furthermore, the Board held that although a complaint based on the *execution* of the agreement was time-barred, evidence related to the execution of the agreement was "relevant in determining whether [the] conduct within the 6-month period was unlawful" and therefore was admissible.

The Supreme Court reversed the Board and, after discussing the nature of the issue presented, established a test for determining the admissibility of evidence related to events which occur more than six months prior to the filing of a complaint.

> It is doubtless true that § 10(b) does not prevent all use of evidence relating to events transpiring more than six months before the filing and service of an unfair labor practice charge. However, in applying rules of evidence as to the admissibility of past events, due regard for the purposes of § 10(b) requires that two different kinds of situations be distinguished. The first is one where occurrences within the six-month limitations period in and of themselves may constitute, as a substantive matter, unfair labor practices. There, earlier events may be utilized to shed light on the true character of matters occurring within the limitations period; and for that purpose § 10(b) ordinarily does not bar such evidentiary use of anterior events. The second situation is that where conduct occurring within the limitations period can be charged to be an unfair labor practice only through reliance on an earlier unfair labor practice. There the use of the earlier unfair labor practice is not merely "evidentiary," since it does not simply lay bare a putative current unfair labor practice. Rather, it serves to cloak with illegality that which was otherwise lawful. And where a complaint based upon

that earlier event is time-barred, to permit the event itself to be so used in effect results in reviving a legally defunct unfair labor practice.

The situation before us is of this latter variety, for the entire foundation of the unfair labor practice charged was the Union's time-barred lack of majority status when the original collective bargaining agreement was signed. In the absence of that fact enforcement of this otherwise valid union security clause was wholly benign.

* * *

Where, as here, a collective bargaining agreement and its enforcement are both perfectly lawful on the face of things, and an unfair labor practice cannot be made out except by reliance on the fact of the agreement's original unlawful execution, an event which, because of limitations, cannot itself be made the subject of an unfair labor practice complaint, we think that permitting resort to the principle that § 10(b) is not a rule of evidence, in order to convert what is otherwise legal into something illegal, would vitiate the policies underlying that section. These policies are to bar litigation over past events "after records have been destroyed, witnesses have gone elsewhere, and recollections of the events in question have become dim and confused, . . ." and of course to stabilize existing bargaining relationships. 362 U.S. at 416-19.

Accord, N.L.R.B. v. *Lawrence Typographical Union*, 376 F.2d 643, 650 (10th Cir. 1967); *American Federation of Grain Millers* v. *N.L.R.B.*, 197 F.2d 451, 453 n. 5, 6 (5th Cir. 1952). *But see N.L.R.B. v. American Aggregate Co.*, 305 F.2d 559, 563 (5th Cir. 1962).

Respondents attempt to avoid the holding in *Bryan Mfg.* by pointing out that it was not the UMW which filed the complaint and sought to revive legally defunct

unfair labor practices. Moreover, they contend that the UMW merely sought to "shed light on the true character of matters occurring within the limitations period" by introducing evidence related to events which transpired prior to that period and that this is permissible under the dichotomous test enunciated in *Bryan Mfg.*

Both of these contentions are without merit. The Supreme Court announced a rule in *Bryan Mfg.* which prevents the resurrection of legally defunct unfair labor practices in the guise of evidence and the resultant subversion of the policies promoted by the limitations proviso of section 10(b). To permit respondents to invoke the company's putative unfair labor practices in this case as a defense to the unlawful picketing charge would be directly contrary to this rule.

During the six-month period preceding the filing of the charges which spawned the present litigation, the SLU was, in the absence of any reference to events which occurred prior to the six-month period, the lawfully recognized representative of the employees at Blue Diamond's Leatherwood No. 1 mine. Moreover, the SLU had signed a three year contract, which was valid on its face, approximately seven months before it filed charges and therefore, under the Board's contract-bar rules, its representative status was not then subject to challenge under Section 9 of the NLRA. Accordingly, the picketing by the members of the UMW was, "on the face of things," illegal under section 8(b)(7)(A); and only by establishing the existence of earlier, time-barred unfair labor practices could the UMW infuse with legality this otherwise illegal conduct.

Thus, respondents seek to do more than merely clarify the nature of events which transpired within the limita-

tions period. They seek to litigate the legality of conduct engaged in by Blue Diamond prior to the limitations period and, if successful, to invoke this conduct as a defense to the unlawful picketing charge. It is precisely this type of circumvention of the policies underlying section 10(b) which the Supreme Court condemned in *Bryan Mfg.*

If the conduct engaged in by Blue Diamond more than six months before the filing of the charges is disregarded, there is substantial evidence in the record considered as a whole to support the Board's finding that the picketing constituted a violation of section 8(b)(7)(A). Furthermore, we also find substantial evidence in the record as a whole to support the Board's finding that respondents were jointly responsible for this illegal conduct. *Cf. United Mine Workers of America* v. *Patton*, 211 F.2d 742, 746 (4th Cir. 1954).

Accordingly, the Board's petition for enforcement of its order against respondents is granted.

Filed December 29, 1969

ORDER

Before: O'SULLIVAN, PECK and MCCREE, Circuit Judges.

On petition to enforce an order of the National Labor Relations Board,

This cause came on to be heard on the transcript of the record from the National Labor Relations Board, and was argued by counsel.

On consideration whereof, it is now ordered, adjudged and decreed by this Court that the petition for enforce-

ment of the order of the National Labor Relations Board be and it is granted.

It is further ordered that Petitioner recover from Respondents the costs on appeal, as itemized below.

PETITION FOR REHEARING

To The Honorable Judges of the United States Court of Appeals for the Sixth Circuit:

District 30, United Mine Workers of America, and Local 8280, United Mine Workers of America, the respondents above named, present this, their petition for a rehearing in the above entitled cause, and, in support thereof, respectfully show:

I.

This Honorable Court in its Opinion and Decision handed down on December 29, 1969, contrary to the position of the above named respondents, decreed that the Board's Decision and Order of June 29, 1967, be enforced. In its Opinion the Court failed to decide the effect of the surrounding secrecy of the recognition of SLU Local 188 by the Blue Diamond Coal Company on April 30, 1965, as regards to the time the six-months limitation period prescribed in Section 10(b) of the National Labor Act, as amended, 29 U.S.C. Section 160 (b) began to run relative to the filing of unfair labor practice charges pertaining thereto. The failure of this Honorable Court to decide whether or not the secrecy of the aforesaid recognition was such so as to make the six-months limitation period as to the filing of an unfair practice charge based upon said recognition to begin to run when knowledge thereof was had by the respondents

renders the Opinion silent as to this essential determination, which necessarily must be made in regard to the availability of the development of the contention of the respondents herein that the picketing complained of by the charging party was not prohibited since the charging party was not lawfully recognized within the meaning of Section 8(b)(7)(A) of the National Labor Relations Act, as amended, 29 U.S.C. Section 158(b)(7)(A). Respondents respectfully submit that the Opinion of the Court was in error when the same failed to make the aforesaid determination and was in error when it held that SLU 188 was lawfully recognized within the meaning of Section 8(b)(7)(A).

II.

Respondents in their main brief in response to the brief for Petitioner, NLRB, on page 22 thereof, made reference to the contract entered into between Blue Diamond Coal Company and SLU, noting as follows:

> "It is to be noted that the record discloses that the contract entered into between Blue Diamond and SLU Local 188 was not made public and was kept hidden by the parties and no notice was ever given to District 30 advising that Blue Diamond had contracted with another labor union. Furthermore, as has been pointed out hereinbefore that at the time the contract with SLU was supposedly entered into, Local 8280 was maintaining a picket line and actively picketing the Blue Diamond Coal Company's Leatherwood No. 1 mine."

This observation was based upon the testimony given by Mr. C. E. Beane, President of District 30, UMWA, in a proceeding wherein this Court's jurisdiction was invoked by respondents on an appeal from a Section 10(1) injunction granted by the United States District Court for

the Eastern District of Kentucky, in the Court's papers in No. 17,555, Getreu, etc., v. District 30, UMW; and Local 8280, UMW, which is referred to in the Brief of the Petitioner on page 2 thereof from which papers the Petitioner referred to in support of its argument. On pages 113a and 114a, respondent's appendix in said proceedings, C. E. Beane stated in regard to the contract entered into by Blue Diamond Coal Company with Local 188, SLU, as follows:

"Q1. Mr. Beane, did you ever receive any notice from Blue Diamond Coal Company that it was negotiating with Southern Labor Union?

A. Never.

Q2. And prior to the execution of the contract on May 5, 1965, between Blue Diamond Coal Company and Local Union 188 of the Southern Labor Union, did you ever receive any notice that they were bargaining with another labor union?

A. No.

Q3. And when did you learn that such a contract had been entered into between Blue Diamond Coal Company and Southern Labor Union?

A. It was, I believe, somewhere in November of 1965.

Q4. State whether or not it was within the six months period?

A. No. it would not have been within the six months period.

Q5. I will ask you if it isn't a fact that following the receipt of this knowledge on your part that you had charges prepared and filed attacking the contract?

A. After learning of the signing of the contract?

Q6. Yes.

A. Yes."

As previously noted this Honorable Court in its Opinion did not comment relative to the effect as regards to the six-months limitation period for filing unfair labor practice charges relative to the secrecy of the Blue Diamond Coal Company in its negotiations with SLU, which prevented the respondents from filing charges within the six-months period as provided in the Act. The evidence is undenied that the negotiations were in secret and that the first knowledge of respondents was at the time noted by Mr. Beane in his testimony. It is clear that the secrecy of the negotiations prevented the filing of a charge within the six month period and the evidence shows charges were promptly filed immediately after learning of the contract executed by Blue Diamond Coal Company with SLU. The Board refused to issue a complaint and its action was affirmed by the General Counsel. (See p. 6 and 7 of Brief for Petitioner, footnote 9). It is submitted, the action of the Board and General Counsel in refusing to issue a complaint because of the six-month limitation period was in error as is shown in the case of *NLRB v. Shawnee Industries, Inc.*, 333 F. 2d. 221 (10, 1964) which involved charges of discrimination in hiring policies wherein the Court made the following observation as to when the six-month limitation period of Section 10(b), National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 USCA:

> "We recognize the principle that events occurring outside of the six-month limitation period of 10(b) 'may be utilized to shed light on the true character of matters occurring within the limitations period'; *and we agree with the Board that the limitation*

period begins when the facts of a discriminatory hiring policy first become known to an applicant." (Our emphasis)

This decision not only shows the error of the Board and General Counsel in refusing to issue a complaint but also supports the contention of the respondents that the recognition of SLU, Local 188, by Blue Diamond Coal Company could be challenged in this cause even though an unfair labor practice charge was not filed within six months after the recognition of SLU.

III.

Though it was not decided by the Court that the six months limitation period relative to challenging the recognition of SLU by Blue Diamond did not begin to run until knowledge thereof was received by the respondents, it is respectfully submitted the foregoing authorities support the proposition that the respondents were not precluded from challenging the recognition of SLU by the six months limitation period by section 10(1) of the Act. It therefore is submitted that the respondents in this proceeding had the right to challenge the lawfulness of the recognition of SLU by Blue Diamond on April 30, 1965. Respondents in their brief did challenge this recognition of SLU; however, the Court in its opinion, as noted aforesaid, did not decide when the six months limitation period began to run as to the recognition of SLU in view of the secrecy surrounding the recognition. As noted previously, respondents respectfully submit that the Court in failing to pass upon the effect of the secrecy of the recognition of SLU as to when the six months limitation period began to run did not pass upon all pertinent issues involved and was in error when it held that SLU was lawfully recognized on April

30, 1965. A background study as revealed by the facts in this cause shows that the United Mine Workers of America had been the recognized bargaining representative of Blue Diamond's employees since about 1945 and in January of 1964, pursuant to a Board conducted election resulting in a vote of 338-0 in favor of UMW, UMW was certified as the collective bargaining agent of Blue Diamond's employees.

Thereafter at a time when the UMW was the certified bargaining representative of Blue Diamond's employees, SLU sought to be recognized as the bargaining representative of the Blue Diamond employees and the company declined on the ground that SLU did not represent a majority of the employees. Later on April 30, 1965, upon the basis of the presentation of authorization cards of 115 employees whose signatures were authenicated by the office manager, Blue Diamond acceded to the request for recognition. At that time as the evidence shows if the entire group of employees of Blue Diamond who participated in the election voting favorably to UMW were considered as the eligible unit for determination for majority status, then obviously SLU did not have a majority status. It is submitted that as pointed out in respondents' main brief, SLU did not represent a majority of the employees and was recognized at a time when UMW had not been decertified as the bargaining representative of Blue Diamond's employees and at least was rebuttably presumed to be the duly certified bargaining agent of the Blue Diamond employees. *Celanese Corp. of America*, 95 NLRB 664, 671-72 (1951); *NLRB v. Richard Kaase Co.*, 346 F. 2d 24, 30-32 (6th Cir. 1965).

IV.

The Court in its opinion did not refer to the decision of

the Supreme Court, in *Brooks* v. *NLRB*, 348 U.S. 96, wherein it was noted on page 103 of the decision as follows: ". . .If an employer has doubts about his duty to continue bargaining, it is his responsibility to petition the Board for relief, while continuing to bargain in good faith until the Board has given some indication that his claim has merit." The record shows that Blue Diamond did not carry out this yardstick of the Supreme Court and it is submitted to view the facts most favorably to SLU it was the duty of Blue Diamond to make a request of the Board for a determination as to who was the collective bargaining agent of its employees. The respondents submit that the failure of Blue Diamond to comply with the mandate of the *Brooks* case rendered the recognition of SLU invalid. Absent a lawful recognition of SLU by Blue Diamond the prohibition against picketing contained in Section 8(b)(7)(A) is not applicable here and the order of NLRB should not be enforced.

V.

It is respectfully submitted that had the Board issued a complaint with reference to the charge of UMW to examine the action of Blue Diamond Coal Company in recognizing SLU at the time requested by UMW that the entire matter could have been fully explored and the *Brooks* opinion would have caused the Board to have made an examination of the facts as they existed in connection with UMW's assertion of an unfair labor practice in regards to Blue Diamond's recognition of SLU. The opinion of this Honorable Court, it is respectfully submitted, sanctions the recognition of SLU by Blue Diamond who had committed unfair labor practices in regards to individual bargaining initially and later in dealing in secrecy with a competing union. Further, the

opinion of this Honorable Court places approval on Board action which is submitted to be offensive to the Board's own decision as shown in the Shawnee case, supra, which provides that the statute of limitations with regards to unfair labor practices begin only when a party becomes knowledgeable of the unfair labor practices involved, all at the expense of a bargaining representative certified by the Board in derogation of the rights of the certified agency.

WHEREFORE, upon the foregoing grounds, it is respectfully urged that this petition for rehearing be granted and that enforcement of the Board's Order be denied and that the position of the respondents herein be sustained.

Filed January 28, 1970

ORDER

Before: O'SULLIVAN, PECK, and MCCREE, Circuit Judges.

The petition for rehearing having come on to be heard; and it appearing that the contentions therein were made in petitioner's original brief and were considered previously by the court and rejected (although without express mention in the opinion); upon consideration,

It is ORDERED that the petition for rehearing be, and it hereby is, denied.

Appendix B

DECISION AND ORDER

On November 29, 1966, Trial Examiner Lowell Goerlich issued his Decision in the above-entitled proceeding, finding that the Respondents had not engaged in certain unfair labor practices within the meaning of Section 8(b)(7)(A) of the National Labor Relations Act, as amended, and recommending that the consolidated complaint be dismissed in its entirety, as set forth in the attached Trial Examiner's Decision. Thereafter, the General Counsel filed exceptions to the Trial Examiner's Decision and a supporting brief, the Charging Party (SLU) filed a brief in support of the General Counsel's exceptions, and the Respondent filed a brief in support of the Trial Examiner's Decision.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its powers in connection with this case to a three-member panel.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Trial Examiner's Decision and the entire record in the case, including the exceptions and briefs, and finds merit in the exceptions of the General Counsel. The relevant findings of fact made by the Trial Examiner, but not his conclusions or recommendations, are, as indicated below, hereby adopted.

The basic facts are not in dispute. Briefly, the Respondent Unions are a local and a district organization of the United Mine Workers of America. The UMW had been the recognized representative of the Employer's employees since about 1945 and was certified January 17,

1964. On February 24, 1964, the Employer served a 60-day notice of termination of the existing contract. Negotiations for a new contract were initiated by an Employer letter of March 16, 1964. The parties quickly reached an impasse on economic issues. When the contract expired on April 27, 1964, the 180 employees then on the payroll ceased work, but apparently no picketing ensued. Bargaining continued until June 25, 1964. Neither party requested a meeting after that date.

On August 11, 1964, the Employer informed the employees by letter that it intended to reopen the mine and that employees who had not returned to work by August 24 would be permanently replaced. Except for a reference to "the same production schedule" that obtained on April 27, the letter did not set forth the terms or conditions of employment. Shortly after receipt of the letter, the nonworking employees decided "for the local officers to go in and talk to Mr. Earl Forrest (mine superintendent) on the conditions of the letter he'd sent and to come back to work". About 200 employees appeared at the company premises shortly after receipt of the letter, and the local president and three committeemen left the group and told the mine superintendent they wished to talk about their jobs and the possibility of returning to work. The superintendent replied that he would "talk to them as individuals but not as a group." After reporting to the group, the union representatives returned, advised the superintendent they could talk with him only as a group, and were informed that in that case he would not talk with them. The group then broke up.

Mining operations were resumed on about November 1, 1964. At a meeting of the Respondent Local shortly after January 19, 1965, and after it was learned that the mine was in operation, it was decided that a picket line

should be instituted. Picketing commenced on January 19 and continued, with one interruption, until it was enjoined in a Section 10(1) proceeding on July 13, 1965. The picket signs stated, *inter alia,* that UMWA and Local 8280 had no contract. Meanwhile, on April 30, 1965, representatives of Southern Labor Union, the Charging Party, herein called SLU, demanded recognition and bargaining on the basis of 120 authorization cards from the unit employees, which then numbered about 120, of whom 28 had been employed previous to November 1, 1964. The Employer's office manager testified that he compared the signatures on the cards with those in the personnel files and, after rejecting about 5 as possibly not authentic, reported to the Employer that the SLU had presented 115 valid cards. The mine superintendent thereupon advised the SLU that it was recognized as collective-bargaining agent and proposed a May 5 meeting to negotiate a contract. On the same day the Employer notified the Respondent District that it was convinced UMW no longer represented the employees. The Employer and SLU representatives met as scheduled on May 4 and, after 14 to 16 hours of negotiations, reached agreement on a contract, which was signed on May 5.

The complaint is limited to picketing which took place after the Employer recognized SLU as bargaining representative of the employees at the Employer's Leatherwood No. 1 mine on April 30, 1965. The Trial Examiner found, *inter alia,* that the Employer engaged in an unfair labor practice when its mine superintendent refused to meet and deal with the local union committee shortly after August 11, 1964, and, instead, insisted upon individual bargaining with the striking employees.[1] He then

[1]The strike began on April 27, 1964, but there was no picketing until January 19, 1965.

reasoned that upon the commission of this unfair labor practice, the economic strikers in Respondent's bargaining unit became unfair labor practice strikers and were thus entitled to reinstatement and to inclusion in the bargaining unit for the purpose of ascertaining whether any union represented a majority therein. Since he found that Respondent had a presumptive majority in such unit on the basis of the Board's certification of the District in January 1964, and that such presumption was not rebutted, the Trial Examiner concluded that on April 30 SLU was a minority union which was not validly recognized.[2] Accordingly, the Trial Examiner held that although recognition and bargaining may have been one object of the picketing,[3] the Respondent was a currently certified union whose picketing was in part to protest against unfair labor practices, and hence the picketing did not violate Section 8(b)(7)(A) of the Act. We cannot agree with the Trial Examiner's view of the case.

Contrary to the Trial Examiner, we deem it unnecessary and improper to pass upon the Employer's conduct which occurred more than 6 months prior to the

[2]The Trial Examiner noted, incidentally, in his footnote 25, that because SLU was a minority union, its contract would not bar a petition for an election.

[3]The Trial Examiner did not specifically find that an object of the picketing was to secure recognition and bargaining, but in his view of the case this object could be lawfully pursued by picketing. However, since the Respondents argue, and the Trial Examiner found, that the Respondents were presumed to be the majority representative and entitled to recognition, and since Respondents contend that this was not a proscribed objective because they were not seeking "initial recognition", such object is implicitly conceded as one aim of the picketing. In any event, we have held that a statement on a picket sign that an employer does not have a contract with a labor organization clearly implies a recognitional and bargaining objective. *Local Joint Executive Board of Hotel and Restaurant Employees and Bartenders, etc. (Leonard Smitley, et al. d/b/a Crown Cafeteria)*, 135 NLRB 1183. Here, the strike in its origin was over the failure of the employer to sign a contract and the picket signs protested the lack of a contract. We find, accordingly, that one object of the picketing of Leatherwood No. 1 Mine was for recognition and a collective-bargaining contract.

filing of the charges herein, and we do not adopt the Trial Examiner's statement of the applicable statutory and decisional law. Rather, we view this case as controlled by our decision in *Roman Stone*,[4] in which we held that the term "lawfully recognized" in Section 8(b)(7)(A) "was meant to include all bargaining relationships immune from attack under Sections 8 and 9 of the Act."

Here, as in *Roman Stone*, the legality of the Employer's recognition of the incumbent union cannot be challenged in an 8(b)(7)(A) proceeding because no timely charge was filed thereon, and because the contract, being valid on its face and of reasonable duration, would be a bar to a representation petition.[5] Accordingly, in the absence of a timely and meritorious charge, the Respondents are not entitled to assert any alleged invalidity in the Employer's recognition of SLU as a defense herein. Therefore, as we have found that the Respondents[6] picketed the Employer after April 30, 1965, at least partially for the purpose of securing recognition and bargaining, we conclude that they thereby violated Section 8(b)(7)(A) of the Act.

---

[4] *International Hod Carriers, et al. (Roman Stone Construction Company)*, 153 NLRB 659.

[5] See *District 19, United Mine Workers of America (Seagraves Coal Company)*, 160 NLRB No. 124, and *Local No. 7463, United Mine Workers of America (Harlan Fuel Company)*, 160 NLRB No. 129.

[6] The Trial Examiner's approach to this case did not require that he consider Respondent District's denial of responsibility for the conduct of the Respondent Local in picketing the premises of the Employer. It appears from the record, however, that payment received by the pickets from the District was disbursed on the picket line by a field representative of the District. Both the president of the Local and the president of the District testified that the latter attended meetings of the Local at which he discussed the conduct of the picketing. The president of the District also testified that Local officers visited the District offices on more than one occasion to discuss the conduct of the picketing. It is thus established on the record that the picketing was a joint venture of the Respondent District and Respondent Local. Accordingly, we shall direct our Order herein to both Respondents.

The Effect of the Unfair Labor Practices upon Commerce

The activities of the Respondents set forth above, occurring in connection with the operations of Leatherwood No. 1 Mine of Blue Diamond Coal Company set forth in the attached Trial Examiner's Decision, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States, and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

The Remedy

Having found that Respondents have engaged in certain unfair labor practices, we shall order that they cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

Conclusions of Law

1. Blue Diamond Coal Company is engaged in commerce and in an industry affecting commerce within the meaning of Section 2(6) and (7) of the Act.

2. Southern Labor Union Local No. 188; District 30, United Mine Workers of America; and Local 8280, United Mine Workers of America, are labor organizations within the meaning of Section 2(5) and 8(b)(7)(A) of the Act.

3. By picketing Leatherwood No. 1 Mine of Blue Diamond Coal Company at Harlan, Kentucky, with an object of forcing or requiring Blue Diamond to recognize and bargain with them as the collective-bargaining representative of its employees, and with a further object of forcing or requiring Blue Diamond's employees to accept or select Respondent as their collective-bargaining representative, at a time when Blue Diamond had lawfully

recognized Southern Labor Union Local No. 188 as the collective-bargaining representative of its employees, and a question concerning representation could not be raised under Section 9(c) of the Act, Respondents have engaged in and are engaging in unfair labor practices within the meaning of Section 8(b)(7)(A) of the Act.

4. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board orders that the Respondents, District 30, United Mine Workers of America, and Local 8280, United Mine Workers of America, their officers, agents, and representatives, shall:

1. Cease and desist from:

(a) Picketing or causing to be picketed or threatening to picket Leatherwood No. 1 Mine of Blue Diamond Coal Company under conditions prohibited by Section 8(b)(7)(A) of the Act, where an object thereof is forcing or requiring such employer to recognize or bargain with them as the collective-bargaining representative of its employees, or forcing or requiring said employees to select or accept Respondents as their collective-bargaining representatives.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act.

(a) Post in conspicuous places at their business offices, meeting halls, and all places where notices to their members are customarily posted, copies of the Notice at-

tached hereto as "Appendix".[7] Copies of said notice, on forms provided by the Regional Director for Region 9, shall, after being signed by an authorized representative of each Respondent, be posted by Respondents immediately upon receipt thereof, and be maintained by them for 60 consecutive days thereafter, in conspicuous places, including all places where notices to members are customarily posted. Reasonable steps shall be taken by the Respondents to insure that said notices are not altered, defaced, or covered by any other material.

(b) Forthwith mail to the aforesaid Regional Director for Region 9, signed copies of said notices for posting by Blue Diamond Coal Company, if it be willing, in places where notices to its employees are customarily posted.

(c) Notify the Regional Director for Region 9, in writing, within 10 days from the date of this Decision, what steps have been taken to comply herewith.

Dated, Washington, D. C., June 29, 1967.

Frank W. McCulloch, Chairman
Gerald A. Brown, Member
Sam Zagoria, Member

(Seal) National Labor Relations Board

---

[7] In the event that this Order is enforced by a decree of a United States Court of Appeals, there shall be substituted for the words "a Decision and Order" the words "a Decree of the United States Court of Appeals, Enforcing an Order."

APPENDIX

NOTICE TO ALL MEMBERS OF DISTRICT 30, UNITED MINE WORKERS OF AMERICA, AND LOCAL No. 8280, UNITED MINE WORKERS OF AMERICA, AND TO ALL EMPLOYEES OF LEATHERWOOD No. 1 MINE OF BLUE DIAMOND COAL COMPANY PURSUANT TO A DECISION AND ORDER

of the National Labor Relations Board and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify you that:

WE WILL NOT under conditions prohibited by Section 8(b)(7) of the Act, picket, or cause to be picketed, or threaten to picket, LEATHERWOOD No. 1 MINE OF BLUE DIAMOND COAL COMPANY, where an object thereof is to force or require LEATHERWOOD No. 1 MINE OF BLUE DIAMOND COAL COMPANY, to recognize or bargain with us as the representatives of its employees, or to force or require the employees of LEATHERWOOD No. 1 MINE OF BLUE DIAMOND COAL COMPANY to accept or select us as their collective-bargaining representative.

District 30, United Mine Workers of America
(Labor Organization)

Dated ..... By .....
(Representative) (Title)

Local 8280, United Mine Workers of America
(Labor Organization)

Dated ..... By .....
(Representative) (Title)

This Notice must remain posted for 60 consecutive

days from the date of posting, and must not be altered, defaced, or covered by any other material.

If members have any question concerning this Notice or compliance with its provisions, they may communicate directly with the Board's Regional Office, Room 2023 Federal Office Building, 550 Main Street, Cincinnati, Ohio 45202 (Tel. No. 684-3627).

TRIAL EXAMINER'S DECISION

Upon charges filed by Southern Labor Union Local No. 188 herein referred to as the Charging Party, the General Counsel of the National Labor Relations Board herein called the Board, on behalf of the Board by the Regional Director for the Ninth Region on June 7, 1966, issued an Order Consolidating Cases, Consolidated Complaint and Notice of Hearing. Local No. 8280, United Mine Workers of America, herein referred to as Respondent Local No. 8280, and District 30, United Mine Workers of America herein referred to as Respondent District 30, were named Respondents. The Consolidated Complaint alleged that the Respondents had committed unfair labor practices within the meaning of Section 8(b)(7)(A) of the National Labor Relations Act as amended; herein referred to as the Act. Respondents filed a timely joint answer to the Consolidated Complaint, denying that they had engaged or were engaging in the unfair labor practices alleged.

The case came on for hearing before the undersigned Trial Examiner Lowell Goerlich in Harlan, Kentucky, on August 16, 17, and 18, 1966. At the close of the General Counsel's evidence, the Respondent moved to dismiss the Consolidated Complaint, as against the Respondents and each of them in that the General Counsel had failed to

establish proof to sustain the charges against the Respondents. The Trial Examiner expressed "serious doubt as to whether or not a prima facie case [had] been established"; however, Respondents' motion was overruled subject to renewal. At the close of all the evidence, the Respondents renewed their motion to dismiss.[1] The Trial Examiner reserved ruling upon such motion in order to enable the General Counsel to submit a brief.

The General Counsel, the Charging Party and the Respondents have submitted briefs supporting their respective positions. The briefs have been carefully considered by the Trial Examiner.

The issue before the Trial Examiner on the Respondents' motion to dismiss is whether the evidence adduced by the General Counsel supports a finding that the picketing which continued at the premises of the Blue Diamond Coal Company's Leatherwood No. 1 Mine after the Blue Diamond Coal Company's recognition of the Southern Labor Union on April 30, 1965, without an election and while the United Mine Workers remained the osten-

---

[1]In stating Respondents' grounds for their motion Respondents' Counsel said among other things:

". . . The evidence shows that at the time when United Mine Workers of America was a lawfully chosen bargaining agent of the employees of Blue Diamond Coal Company immediately after August 11, 1964, the Blue Diamond Coal Company refused, and this appears as a matter of law, to talk with the employees who had chosen the United Mine Workers of America as their bargaining agent, and was members of Respondent's Local 8280, refused to talk with them as a group and was told by an official of the Blue Diamond Coal Company that said Company would converse and talk with them individually. It therefore is contended that this action, that is undenied in this record, constitutes an unfair labor practice upon the part of Blue Diamond Coal Company and that the Blue Diamond Coal Company having committed same cannot now come here before this Board . . . without this unfair labor practice being considered as a defense to the charger (sic) and against the Respondents.

sible collective bargaining agent, was in violation of Section 8(b)(7)(A) of the Act.[2]

The essential facts which are not in dispute are as follows:

Blue Diamond Coal Company (sometimes referred to herein as the Employer or Blue Diamond) is a Delaware corporation engaged in the mining, processing and sale of coal at its Leatherwood No. 1 Mine located near Leatherwood, Kentucky. It also operated the Blair Fork Mine and the Scotia Mine.[3] The Southern Labor Union during the period covered by this decision maintained labor contracts with the Blue Diamond Coal Company at such establishments. It is admitted that the Blue Diamond Coal Company is engaged in commerce as defined in Section 2(6) and (7) of the Act, and Trial Examiner so finds.

On January 17, 1964,[4] the Regional Director for the Ninth Region certified the United Mine Workers of America as the collective bargaining agent for a unit of "all production and maintenance employees employed at the employer's Leatherwood, Kentucky mine, excluding

---

[2]Section 8(b)(7)(A) provides:
It shall be an unfair labor practice for a labor organization or its agent—

(7) to picket or cause to be picketed, or threaten to picket or cause to be picketed, any employer where an object thereof is forcing or requiring an employer to recognize or bargain with a labor organization as the representative of his employees, or forcing or requiring the employees of an employer to accept or select such labor organization as their collective bargaining representative, unless such labor organization is currently certified as the representative of such employees:

(A) where the employer has lawfully recognized in accordance with this Act any other labor organization and a question concerning representation may not appropriately be raised under Section 9(c) of this Act.

[3]The alleged unlawful picketing occurred only at the Leatherwood No. 1 Mine.

[4]The petition for an election had been filed on November 20, 1962, and an election was conducted on September 26, 1963.

all office clerical employees, professional employees, guards, foremen and supervisors as defined in the Act." The certification resulted from an election in which 338 ballots were cast for the United Mine Workers of America and none against it. There were 367 eligible voters; 11 ballots were challenged. Thereafter on February 24, 1964, Blue Diamond served upon the Respondents a 60 day notice to terminate the contract[5] which covered the Leatherwood No. 1 Mine. Bargaining for a new contract commenced on March 16, 1964. On April 27, 1964, the contract expired and work ceased at the mine. "[A]bout 180" employees were on the payroll in the contract unit on April 27, 1964. None continued working.

On May 25, 1964, Blue Diamond Coal Company's vice president, V. D. Toler, wrote C. E. Beane, President of District 30, a letter summarizing the results of the bargaining sessions to date. Attached to the letter was a "proposition" offered by the Company on May 15, 1964. The letter ended with the paragraph.

> "On May 21, 1964, I telephoned you for the purpose of ascertaining your reaction to the last proposal. You informed me that you would be unable to accept our proposal and you again suggested that we execute the new United Mine Workers of America's contract that was effective April 2, 1964, which for economic reasons was not acceptable to us. During this conversation, I believe it was mutually understood that further meetings would be fruitless in view of economic conditions at the Leatherwood Mine and the national policy of the United Mine Workers of America. If I am in error about this understanding, please advise."

---

[5]According to the Counsel for the General Counsel prior to November, 1962, "United Mine Workers of America . . . the parent organization of both the district and the local, was for more than 10 years recognized as collective bargaining representative of Blue Diamond Mine employees involved herein."

President Beane without contradiction testified that he answered Toler's letter and advised Toler that he did not intend to leave the impression that negotiations had been broken off but that he was "ready to meet again at any time that could mutually be arranged." The final meeting between the parties took place on June 25, 1964; since that date the employer has not engaged in collective bargaining with any of the representatives of the United Mine Workers Union.

On August 11, 1964, Earl Forrest, superintendent of Leatherwood No. 1 Mine, directed the following letter to each employee who had ceased work on April 27, 1964.

> "This is to give you formal notice that work is available for you at the Leatherwood Mine if you wish to return to work. It is planned to re-open the mine upon the same production schedule, two shifts, as was being pursued on April 27, 1964. Jobs will be given to those first returning to work, regardless of whether laid off or working just prior to that date.
>
> We hope that you will return to work, but if you have not done so by August 24, 1964, we shall assume that you do not intend to return, and after that date we will employ permanent replacements for such of our employees, as continue to refuse this offered employment.
>
> We want to assure you that there will be no discrimination against you, and even if you remain on strike after August 24, we will be glad to give you employment unless your job has been filled by a replacement. However, it is only fair to advise you that in the event your job is filled by a replacement before you offer to return to work, that replacement will not be discharged in order to make place for you.
>
> We would much prefer that you return to work, rather than be forced to replace you with someone

else for we would rather have our present employees on the job."

Shortly after the letter was received the nonworking employees of the Company (no employees in the certified unit were working at the time) decided "for the local officers to go in and talk to Mr. Earl Forrest on the conditions of the letter he'd sent and *to come back to work.*" (Italics added)[6] About 200 employees appeared at the Company's premises. Local Union President, Willie Couch, with whom Forrest had dealt on employee grievances and other collective bargaining matters, and committeemen John Blair, Raymond Tiptons and Russel Schrader left the group to talk to Forrest. According to Forrest, "they told [him] they wanted to talk to [him] concerning their job or going back to work or something along that line." Forrest responded that he "would talk to them as individuals, but not as a group." Reference was made to Forrest's letter of August 11, 1964.

After Forrest's communication the committee rejoined the group observing to Forrest before they left that "they'd find out about it." They returned within 10 minutes and "told [Forrest] they'd talk to [him] as a group, but they couldn't talk to him as individuals." Forrest testified, "I told them we couldn't talk then. So they must have told the men. They broke up pretty soon and got to leaving."[7] According to Forrest, he was following Vice-president Toler's instructions.

---

[6]Other than reference to the "same production schedule" the letter did not mention the terms or conditions of employment offered.

[7]John Blair testified, ". . . Earl Forrest come down and opened the door and he asked Willie what he was wanting. Willie told him that the men had sent us up there as a committee to talk to him to see what he had to offer in this letter. And Earl Forrest pulled the door back together and as he was pulling the door together he said that I will not see you, the men as a committee, but I will see each individual, if they want to talk to me that way."

Toler testified that he knew about the incident and was aware that Forrest had informed the Union committee that "he would not talk to them as a group, but as individuals." Toler said that it was upon his instructions that Forrest refused to discuss "reemployment of these former employees with a collective group or committee." Toler had instructed Forrest to meet only with the employees "individually" and not to bargain with them as a "committee collectively." Such instructions were pursuant to the Company's policy which Toler described, "Well, the policy I tried to establish, which was my intention of establishing, was that we thought there would be some employees return to work, and that whenever they did come to work they would have to be talked to individually. . . . About the conditions of employment . . . wages, hours of work, general conditions of employment." The policy[6] remained in effect on April 30, 1965. The record discloses that the policy was applied to employees who returned to work.

Following August 11, Blue Diamond commenced operations. Shortly prior to January 19, 1965 the Local Union met and, according to President Couch whose testimony is credited, decided to "put a picket line up and see if they'd recognize the picket line." Couch testified, "Well, they started back to work up there, the company did. We found out they had a stock pile of coal that we had, that we had loaded and they dumped it up there, that they hadn't paid any royalty on at that time. And they started loading the stockpile of coal up and they were hiring outside men to come in there to do this job and taking our jobs that we were on. We had a meeting, the men did of Local 8280 and we decided that we had jobs.

[6]The policy was applicable to employees who had ceased work on April 27, 1964.

That we was the bargaining agent up there. We had an election and we had chosen the United Mine Workers to bargain for us. And then them was our jobs up there when the contract expired and if anybody worked up there we wanted our job. *And the Company refused to talk to us on the letter.* We went back to talk to them. We had a meeting and we decided that's the only choice we had to hold up for our rights was to put a picket line up and to see if they recognized a picket line."[9] (Italics added)

Peaceful picketing[10] commenced at Blue Diamond's premises on January 19, 1965. The picketing was conducted by employees who "stood around or sat in cars." Picket signs were set beside the road which noted among other things that Local 8280 was on strike.

In the latter part of January or early February 1965, the Southern Labor Union demanded recognition for employees at the Leatherwood No. 1 Mine. The employer denied the request on the ground that the Southern Labor Union[11] at the time did not represent a majority of its employees.

On March 4, 1965, the Perry County Circuit Court of the State of Tennessee granted a temporary restraining order which could be interpreted as prohibiting all pickets. Picketing ceased thereafter until March 31, 1965, at which time the temporary restraining order was modi-

---

[9]According to C. E. Beane, President of District 30, the Local Union officers reported to him that "they had not picketed until the Company reopened the mine and started hiring men and that since the Company had refused to meet with them down there, and were hiring men, they were up there to see if they could protect their jobs and asked the men not to go on the jobs there that belonged to them."

[10]When President Beane attended the Local's meeting he "told them if they continued to picket to do it peacefully. . . ."

[11]Local 188 is an affiliate of the Southern Labor Union. It was chartered May 5, 1965.

fied permitting four pickets to appear at each entrance of the plant making eight pickets in all. The picketing continued until July 13, 1966, at which time a Section 10(1) injunction was granted by the District Court for Eastern District of Kentucky, which is still in force. During the entire period of picketing, the picketing was conducted in the same manner and picket signs were carried which noted among other things that Local 8280 was on strike.

On April 30, 1965, representatives of the Southern Labor Union appeared at the offices of Blue Diamond and made a demand on Vice President and General Manager Toler and Superintendent Earl Forrest, for bargaining. Representatives of the Southern Labor Union presented approximately 120 authorizations. At the time there were 119 employees in the unit, 28 of whom had been employees who had worked for the Company prior to November 1, 1964. The authorization cards were turned over to Fred Keene, the Employer's office manager, for the purpose of authenticating the signatures of the employees appearing on the authorization cards. Keene checked the signature on each card with the signature of the employee appearing in the Employer's personnel file. After checking all the cards Keene reported to Forrest that there were about 115 valid cards. Dates on the cards were not checked. Forrest immediately contacted the Southern Labor Union representatives and advised them that Blue Diamond was recognizing the Southern Labor Union as its employees' collective bargaining agent and would meet with it for the purpose of negotiating a collective-bargaining agreement on May 4, 1965.

On the same date, April 30, 1965, Toler directed a letter to C. E. Beane, President of District 30, as follows:

"You are hereby notified that Blue Diamond Coal Co.

is convinced that United Mine Workers of America no longer represents a majority of our employees at our Leatherwood Mine, Leatherwood, Perry Co., Ky."

Negotiations were commenced between Blue Diamond and the Southern Labor Union at the Union's office in Cumberland, Kentucky. A contract was signed on May 5. In all the parties negotiated between 14 and 18 hours. The contract contained the same hours, the same vacations, the same welfare fund and the same wages as that which had been negotiated and executed at the Employer's Blair Fork Mine between the same parties.

Toler testified that during the period of the strike the Respondent did not disqualify any of the employees by reason of any strike violence which they may have committed during the strike.

Conclusions

The General Counsel contends that the above described picketing which continued on and after the Employer's recognition of Southern Labor Union Local No. 188 on April 30, 1965 constituted an unfair labor practice within the meaning of Section 8(b)(7)(A) of the Act. Section 8(b)(7)(A) provides.

> It shall be an unfair labor practice for a labor organization or its agents—
>
> • • •
>
> (7) to picket or cause to be picketed, or threaten to picket or cause to be picketed, any employer where *an object thereof is forcing or requiring an employer to recognize or bargain with a labor organization* as the representative of his employees, or forcing or requiring the employees of an employer to accept or select such labor organization as their collective bar-

gaining representative, *unless such labor organization is currently certified as the representative of such employees:*

(A) where the employer has *lawfully recognized* in accordance with this Act any other labor organization and a question concerning representation may not appropriately be raised under Section 9(c) of this Act. (Italics added)

The General Counsel does not contend that the picketing described above prior to the Employer's recognition of the Southern Labor Union on April 30, 1965 was in violation of Section 8(b)(7)(A) but asserts that thereafter the picketing was converted into unlawful picketing in violation of Section 8(b)(7)(A) of the Act by the Employer's recognition of the Southern Labor Union and its contemporaneous withdrawal of recognition from the Respondents. According to the General Counsel the picketing which continued without substantial change after the Employer's recognition of the Southern Labor Union was "clearly for the purpose of regaining recognition for the District and/or the International." Thus, reasons the General Counsel, the picketing continued as unprotected concerted activity and the sanctions of Section 8(b)(7)(A) became applicable.

First: In *International Hod Carriers Building, etc., (C. A. Blinne Construction Co.)* 135 NLRB 1153, 1156, the Board said in reference to Section 8(b)(7) of the Act

"The section as a whole, as is apparent from its opening phrases, prescribes limitations only on picketing for an object of 'recognition' or 'bargaining' (both of which terms will hereinafter be subsumed under the single term 'recognition') or for an object of organization. *Picketing for other objects is not proscribed by this section. Moreover, not all picketing for recognition or organization is proscribed. A 'cur-*

rently certified' union may picket for recognition or organization of employees for whom it is certified. And even a union which is not certified is barred from recognition or organization picketing only in three general areas. The first area, defined in subparagraph (A) of Section 8(b)(7), relates to situations where another union has been lawfully recognized and a question concerning representation cannot appropriately be raised. . . ." (Italics added)

The Board further opined at page 1159:

"However, at the risk of laboring the obvious, it is important to note that structurally, as well as grammatically, subparagraphs (A), (B), and (C) are subordinate and controlled by the opening phrases of Section 8(b)(7). *In other words, the thrust of all the Section 8(b)(7) provisions is only upon picketing for an object of recognition or organization, and not upon picketing for other objects.*" (Italics added)

In *National Packing Company, Inc.*, 158 NLRB No. 142 the Board reaffirmed its position taken in the *Blinne* case, *supra*, the Board said:

"Section 8(b)(7) is concerned specifically with limitations on the right to picket. We are convinced, however, that the right to picket and the right to strike in the instant case are inextricably part of the same conduct. Therefore, as the Supreme Court stated in *Curtis Bros., supra* [362 U.S. 274] an order against peaceful picketing would obviously 'impede' the right to strike; and can be sustained only if 'specifically provided for' in the Act. With regard to the types of picketing that were 'specifically provided for,' we stated in the *Blinne* case [135 NLRB 1153] that Section 8(b)(7) 'as a whole, as is apparent from its opening phrases, prescribes limitations only on picketing for an object of "recognition" or "bargaining" . . . or for an object of organization. *Picketing for other objects is not prescribed by this section.*'" (Italics added)

The Board held that, in that the strike was to protest the employer's "broken promises," the picketing was not for the purpose of obtaining recognition or bargaining; hence the employees did not picket for an object violative of Section 8(b)(7) of the Act. In reaching this conclusion the Board said, "We have held that 8(b)(7)(B) does not preclude picketing to protest an employer's unfair labor practice charges." The Board pointed out that one of the elements to be proved in order to establish a Section 8(b)(7) violation is that "the object of the picketing is to force the Respondent 'to recognize or bargain with a labor organization.' " Thus the "object of the picketing" becomes pertinent in this proceeding for, if the "object of the picketing" was other than one proscribed by Section 8(b)(7)(A) of the Act, the picketing was lawful.

The Respondents maintain that such "picketing . . . was engaged in, not with the intent of violating the Act, but in protest to the violation of the Act by the Blue Diamond Coal Company . . ."

It is clear that an object of the picketing was to protest the Employer's insistence upon individual bargaining with the employees who had ceased to work. The policy which was announced and followed during the certification year interfered with, restrained and coerced employees in the exercise of their rights guaranteed by Section 7 of the Act and the Employer thereby violated Section 8(a)(1) of the Act.[12] Such are the teachings of the Supreme Court in *Medo Photo Supply Corporation* v. *N.L.R.B.*, 321 U.S. 678, 684. The Supreme Court said:

"That it is a violation of the essential principle

[12]Had the Employer not instituted this policy it seems likely that all employees may have returned to work by April 30, 1965, since their purpose in approaching Superintendent Forrest was "to come back to work."

> of collective bargaining and an infringement of the Act for the employer to disregard the bargaining representative by negotiating with individual employees, whether a majority or a minority, with respect to wages, hours and working conditions was recognized by this Court in *J. I. Case Co.* v. *Labor Board*, 321 U.S. 332. . . . The statute guarantees to all employees the right to bargain collectively through their chosen representatives. Bargaining carried on by the employer directly with the employees, whether a minority or majority, who have not revoked their designation of a bargaining agent, would be subversive of the mode of collective bargaining which the statute has ordained, as the Board, the expert body in the field, has found. Such conduct is therefore an interference with the rights guaranteed by Section 7 and a violation of Section 8(1) of the Act."

It follows, therefore, since an object of the picketing was in protest of the Employer's unfair labor practices, the picketing for such object was not proscribed by Section 8(b)(7)(A). However, the General Counsel, relying upon the *Blinne* case, *supra*, but without reference to any specific language therein, argues that the Trial Examiner may not consider the unfair character of the picketing because a "meritorious charge alleging same" has not been filed.

Unfair labor practice strikers "do not lose their status and are entitled to reinstatement with back pay, even if replacements for them have been made" *Mastro-Plastic Corp.* v. *N.L.R.B.*, 350 U.S. 278. Moreover, where an economic strike has been converted into an unfair labor practice strike as in the instant case an employer is likewise obligated to reinstate "unfair labor practice striking employees upon their unconditional offers to return to

work."[13] *Philip Carey Mfg. Co., Miami Cabinet Division v. N.L.R.B.*, 331 F. 2d 720, 729 (C.A. 6).

The Trial Examiner finds nothing in the Act or in the legislative history of the Act where the intent is expressed that unfair labor practice strikers shall be ousted from their right to continue peaceful picketing against unremedied unfair labor practices or that they shall lose their status as unfair labor practice strikers because a "meritorious charge" alleging unfair labor practice has not been filed with the Board where, as here, competent and undisputed evidence established that unfair labor practices have been committed against which the picketing is directed. Indeed in *National Packing Company, Inc., supra* the Respondent employer was allowed to urge a Section 8(b)(7) defense against an alleged Section 8(a)(1) violation although it did not appear that a meritorious charge had been filed alleging a violation of Section 8(b)(7).

The General Counsel's theory leads to the specious conclusion that employees striking against the unfair labor practices of their Employer, even though such unfair labor practices are provable, are not permitted the protection afforded to unfair labor practice strikers unless and until a "meritorious charge" has been filed. The employees in the instant case were unfair labor practice strikers by reason of their strike against their Employer's unfair labor practices and remained unfair labor practice strikers even though a "meritorious charge" was

---

[13] In *N.L.R.B.* v. *Mackay Radio and Telegraph Co.*, 304 U.S. 333, 345, the Supreme Court said:

"Within this definition [Section 2(3) of the Act] the strikers remained employees for the purpose of the Act and were protected against unfair labor practices denounced by it."

not filed with the Board.[14] The Trial Examiner finds nothing in the Act which limits the period during which unfair labor practice strikers may continue to strike or picket or bars them from a return to work upon an unconditional offer. Unfair labor practice strikers are apparent favorites of the law whose rights are not to be cut off except upon specific statutory direction. (See *Mastro Plastics Corp.* v. *Labor Board, supra*). The Trial Examiner finds none. "Nor may we forget that the interests to be protected are primarily those of employees, . . ." *Philip Carey Mfg. Co., Miami Cabinet Division* v. *N.L.R.B., supra,* 735. Under the circumstances of this case the failure of the Union to file unfair labor practice charges ought not to work a forfeiture of employees' statutory rights.

An Employer's refusal to reinstate unfair labor practice strikers is an unfair labor practice. *Rangaire Corporation,* 157 NLRB No. 62, Fn. 11. Blue Diamond's employees continued as unfair labor practice strikers throughout the periods herein involved and as unfair labor practices strikers exercised a protected right to picket in protest of the unfair labor practices against which they were striking until such time as the unfair labor practices were remedied. Picketing for such purpose does not fall within the proscription of Section 8(b)(7)(A) and may not be enjoined.

Second: In addition to proving that an objective of the picketing was for recognition or organization, the General Counsel must also prove, in order to establish a Section 8(b)(7)(A) violation, that the picketing was not on behalf of a labor organization "currently certified as the representative of such employees." The General

[14]President Beane testified that charges were not filed with the Board.

Counsel concedes that the picketing was on behalf of "the District and/or International."[15]

The International was certified as bargaining representative on January 16, 1964. Blue Diamond's employees left their jobs on April 27, 1965. Had the strike been an economic strike these employees, who exceeded the returned strikers and striker replacements in number, would have been included with those employees eligible to determine the majority status of the International until April 28, 1965 pursuant to Section 9(c)(3) of the Act. Thus, prior to April 29, 1965, the International's certification was current and valid. The General Counsel does not claim otherwise but asserts that the International "was not 'currently certified' on April 30, 1965 within the meaning of 8(b)(7)(A)." Whether the International lost its current certification, of course, depends upon whether the presumption as to the fact of its continued majority status created by the certification is rebutted by "competent evidence." See *Celanese Corporation of America,* 95 NLRB 664, 672.[16] It becomes pertinent therefore to examine the record to determine whether the evidence adduced rebuts the presumption.[17]

The Trial Examiner is of the opinion that the presumption as to the fact of the majority status by the International created by the certification has not been rebutted

---

[15]It is alleged in the Consolidated Complaint that ". . . Respondents have picketed, and caused to be picketed. . . ."

[16]The General Counsel apparently recognized this proposition of law since he cited the following language from the case of *Celanese Corporation of America, supra,* 672, ". . . However, after the first year if the certificate has elapsed, though the certificate still creates a presumption as to the fact of majority status by the union, the presumption is at that point rebuttable even in the absence of unusual circumstances. . . ."

[17]In this regard the General Counsel has not brought to the Trial Examiner's attention the specific evidence upon which he may rely for rebutting the presumption.

by competent evidence. Of controlling importance in reaching this conclusion are the following factors.

(a) On April 30, 1965 the unfair labor practice strikers referred to above exceeded the number of returned strikers and striker replacements.

(b) Competent credible evidence is lacking to prove that a majority of the working employees of Blue Diamond had designated a labor union other than the International as their bargaining agent on April 30, 1965.

Dewey Goodson, a member of the Southern Labor Union, obtained two or three packages of the blank designation cards from the Southern Labor Union at Cumberland, Kentucky, some time in January 1965. These cards were distributed to Blue Diamond employees. Goodson testified that cards were signed on the job. In soliciting signatures Goodson told the employees that "if there wasn't a union in the plant they would have to quit."[18]

Designation cards for the Southern Labor Union which were offered into evidence were identified by Blue Diamond's office manager Keen as cards which were submitted to the Employer on April 30, 1965. Relying upon these cards, Blue Diamond recognized the Southern Labor Union.[19] For the purpose of authenticating the cards Keen testified that he "checked each individual signature against the signatures that were in the per-

[18]While there is some ambiguity in Goodson's testimony he gave employees the impression that if they did not choose the Southern Labor Union they would lose their jobs. Thus there is an unresolved question in the record as to whether the cards represented the uncoerced desires of the signatories.

[19]The fact that Blue Diamond may have recognized the Southern Labor Union in good faith is immaterial as proof of the loss of International's majority status. See *International Ladies' Garment Workers' Union, AFL-CIO* v. *N.L.R.B.*, 366 U.S. 731, 738.

sonnel file of each individual." Out of the 120 cards submitted he rejected 4 or 5 "because their signature didn't appear to be authentic according to their signature in the personnel file."[20] Keen testified that he possessed no "special training as far as handwriting, reading handwriting and so forth is concerned."[21] Keen testified that he did not check the dates appearing on the cards.[22] Some of the cards bore dates later than April 30, 1965; some cards were of employees whose names did not appear on the Employer's April 30th payroll. After Keen checked the cards they did not remain in his custody or control. While Keen identified the cards as those which he had examined on April 30, 1965 he did not, at the hearing, pass upon the authenticity of the signatures appearing upon them. The General Counsel offered no other proof of the validity of the signatures appearing on the cards.[23] It is clear that the cards were not self-authenticating; but proof was required to establish the validity of the signatures appearing on them. Indeed, Keen's apparent confusion on the witness stand in reference to the cards, the dispatch with which the cards were validated by the Employer and the speedy execution of the contract with the Southern Labor Union manifested a prior determination to recognize such Union rather than a desire to carefully

---

[20]Keen did not recall which cards he had considered bore authentic signatures.

[21]Keen was asked under what circumstances would his job have required him to review the authenticity of an employee's signature. He answered, ". . . I sign most of them up. Of course, I have seen them there sign their name at the time they signed up. Of course, if there is any question that comes up regarding the pay day, the pay day the man might have gotten, or the endorsement on a check I would always check it, and several times I've done that; checked the signature against the signature of the man at the time he signed up."

[22]A substantial majority of the cards produced at the hearing were dated January 21, 1965.

[23]The record is barren of any authentic specimen signatures with which the Trial Examiner could have compared the signatures on the cards.

consider the validity of the signatures. Moreover, the Employer made no investigation at all to ascertain whether the cards, which on their faces disclosed that a majority of them were executed in January, expressed the employees' desires on April 30. It seems clear that the record as a whole does not disclose that the Employer engaged in careful cross-checking of well-analyzed employer records with the union authorizations. Moreover, the fact that the General Counsel produced no witnesses to authenticate the signatures, although it is apparent that such witnesses were available, raises doubts as to whether a majority of the signatures on the cards were in fact valid designations on April 30.[24]

Viewing the record as a whole the Trial Examiner finds that the proof adduced by the General Counsel is insufficient to rebut the presumption as to the fact of majority status by the International created by the certification and that the International was "currently certified as the representative" of Blue Diamond's employees on April 30, 1965.[25]

The Respondent's motion to dismiss is granted and the Consolidated Complaint is dismissed.

Dated at Washington, D. C., November 29, 1966.

/s/ Lowell Goerlich
Trial Examiner

---

[24]". . . where the party on whom rests the burden of evidence as to a particular fact has the evidence within his control and withholds it, the presumption is that such evidence is against his interest and in-insistence." *N.L.R.B.* v. *Ohio Calcium Co.*, 133 F. 2d 721, 727 (C.A. 6).

[25]The Trial Examiner has considered immaterial any reference to the contract executed on May 5, 1965, between the Southern Labor Union and Blue Diamond since the claim is that the picketing became unlawful on April 30, 1965. Moreover, the contract which was, on the basis of the record, executed by a minority union other than the certified union could not constitute a bar to a representation proceeding. *Cf. Meadowsweet Dairy Farms, Inc.*, 158 NLRB No. 103.

APPENDIX C

29 USCA 104(c) [Section 4(c), Norris-LaGuardia Act]:

No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute (as these terms are herein defined) from doing, whether singly or in concert, any of the following acts:

. . .

(c) Paying or giving to, or withholding from, any person participating or interested in such labor dispute, any strike or unemployment benefits or insurance, or other moneys or things of value;

. . .

Mar. 23, 1932, c. 90, §4, 47 Stat. 70.

* * * * *

29 USCA 152(3) [Section 2(3), National Labor Relations Act]:

When used in this subchapter—

. . .

(3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless this subchapter explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment . . .

. . .

July 5, 1935, c. 372, §2, 49 Stat. 450; June 23, 1947, c. 120, Title I, §101, 61 Stat. 137.

* * * * *

29 USCA 157 (Section 7, National Labor Relations Act):

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, . . . July 5, 1935, c. 372, §7, 49 Stat. 452; June 23, 1947, c. 120, Title I, §101, 61 Stat. 140.

* * * * *

29 USCA 158(a)(1) [Section 8(a)(1), National Labor Relations Act]:

(a) It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

* * * * *

29 USCA 158(b)(7)(A) [Section 8(b)(7)(A), National Relations Act]:

(b) It shall be an unfair practice for a labor organization or its agents—

. . .

(7) to picket or cause to be picketed, or threaten to picket or cause to be picketed, any employer where an object thereof is forcing or requiring an employer to recognize or bargain with a labor organization as the representative of his employees, or forcing or requiring the employees of an employer to accept or select such labor organization as their collective bargaining representative, unless such labor organization is currently certified as the representative of such employees:

(A) where the employer has lawfully recognized in accordance with this subchapter any other labor organization and a question concerning representation may not appropriately be raised under section 159(c) of this title,

. . .

July 5, 1935, c. 372, §8, 49 Stat. 452; June 23, 1947, c. 120, Title I, §101, 61 Stat. 140; Oct. 22, 1951, c. 534, §1(b), 65 Stat. 601; Sept. 14, 1959, Pub.L. 86-257, Title II, §201(e), Title VII, §§704(a)-(c), 705(a), 73 Stat. 525, 542, 545.

* * * * *

29 USCA 159(c) [Section 9(c), National Labor Relations Act]:

(3) No election shall be directed in any bargaining unit or any subdivision within which, in the preceding twelve-month period, a valid election shall have been held. Employees engaged in an economic strike who are not entitled to reinstatement shall be eligible to vote under such regulations as the Board shall find are consistent with the purposes and provisions of this Act in any election conducted within twelve months after the commencement of the strike. In any election where none of the choices on the ballot receives a majority, a run-off shall be conducted, the ballot providing for a selection between the two choices receiving the largest and second largest number of valid votes cast in the election.

* * * * *

29 USCA 160(b) [Section 10(b), National Labor Relations Act]:

(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor prac-

tice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: *Provided,* That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge. . . . The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint . . . Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States . . .

* * * * *

29 USCA 160(e) [Section 10(e), National Labor Relations Act]:

(e) The Board shall have power to petition any court of appeals of the United States . . . wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order . . . and shall file in the court the record in the proceedings . . . Upon the filing of such petition, the court shall . . . have jurisdiction of the proceeding and of the question determined therein,

and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board . . . The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive . . . Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of Title 28.

. . .

June 7, 1934, c. 426, 48 Stat. 926; July 5, 1935, c. 372, §10, 49 Stat. 453; June 25, 1936, c. 804, 49 Stat. 1921; June 23, 1947, c. 120, Title I, §101, 61 Stat. 146; June 25, 1948, c. 646, §32(a), (b), 62 Stat. 991; May 24, 1949, c. 139, §127, 63 Stat. 107; Aug. 28, 1958, Pub.L. 85-791, §13, 72 Stat. 945; Sept. 14, 1959, Pub.L. 86-257, Title VII, §§704(d), 706, 73 Stat. 544.

In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 1496

DISTRICT 30, UNITED MINE WORKERS OF AMERICA, AND LOCAL 8280, UNITED MINE WORKERS OF AMERICA, PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a–13a) is reported at 422 F. 2d 115. The Board's decision and order (Pet. App. 22a–31a) are reported at 166 NLRB No. 271.

JURISDICTION

The judgment of the court of appeals (Pet. App. 13a–14a) was entered on December 29, 1969, and a petition for rehearing was denied on January 28, 1970 (Pet. App. 21a). The petition for a writ of certiorari was filed on April 28, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a union, in order to justify picketing which on its face is violative of Section 8(b)(7)(A) of the National Labor Relations Act, may rely on past unfair labor practice conduct engaged in by the employer which the Board would be barred from considering directly because it occurred beyond the six-month period prescribed in Section 10(b) for filing an unfair labor practice charge.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151 *et seq.*), are set forth in the Appendix to the petition (Pet. App. 51a–55a).

STATEMENT

On February 24, 1964, the Blue Diamond Coal Company gave notice to petitioners, District 30 and Local 8280, United Mine Workers of America (UMW), of its desire to terminate the collective bargaining agreement covering its Leatherwood No. 1 Mine and to negotiate a new one (Pet. App. 23a).[1] Blue Diamond and UMW met six times in bargaining sessions, but they could not reach a new agreement. On April 27, 1964, when the current contract expired, the approximately 160 employees then on the payroll

[1] UMW had been the Board-certified representative of the employees at Leatherwood No. 1 since January 1964, and had been recognized without a certification prior to that time (Pet. App. 22a). Two other mines owned by Blue Diamond were represented by the Southern Labor Union (R. 55a–56a). "R." references are to the appendix to the parties' briefs in the court below.

ceased work, causing mining operations to shut down (Pet. App. 23a).

On August 11, 1964, Blue Diamond notified the employees by letter that it intended to reopen the mine and that employees who did not return by August 24 would be replaced. Upon receipt of the letter, approximately 200 employees came to the mine and, represented by the president of Local 8280 and three committeemen, asked the mine superintendent to discuss the terms on which they could return to work. The superintendent said that he would "talk to them as individuals but not as a group." Finding that unacceptable, the employees left (Pet. App. 23a; R. 268a-273a).

In November 1964, Blue Diamond resumed operations with a work force of approximately 120 men, of whom 28 were returning employees (Pet. App. 23a-24a). In January 1965, after it learned that operations had resumed at the mine, Local 8280 held a meeting, at which it was decided to picket the mine because it "was the bargaining agent up there. We had an election and we had chosen the United Mine Workers to bargain for us" (Pet. App. 38a). Picketing began on January 19, 1965, with signs reading that UMW and Local 8280 had no contract at the mine (Pet. App. 24a).[2]

On April 30, 1965, Southern Labor Union (SLU) demanded recognition at Leatherwood No. 1 on the basis of 120 authorization cards signed by the em-

[2] The picketing continued, with one interruption, until July 13, 1965, when it was enjoined by the district court in a proceeding brought by the Board's Regional Director under Section 10(*l*) of the Act (Pet. App. 24a).

ployees. Blue Diamond compared the signatures on the cards with those in its personnel files, and, after authenticating 115 cards, advised SLU that its recognition demand was accepted.[3] At the same time, Blue Diamond wrote to UMW stating: "You are hereby notified that Blue Diamond Coal Co. is convinced that the United Mine Workers of America no longer represents a majority of our employees at our Leatherwood Mine * * *" (Pet. App. 39a-40a). On May 5, 1965, Blue Diamond and SLU, after approximately 16 hours of negotiations, entered into a collective agreement for a three-year term (Pet. App. 24a; R. 317a).

UMW continued its picketing and, on December 7, 1965, SLU filed an unfair labor practice charge alleging that the picketing was for a recognitional objective and thus violated Section 8(b)(7)(A) of the Act (R. 1a). The Regional Director issued a complaint, and thereafter obtained a temporary injunction under Section 10(*l*) (see note 2, *supra*).

On the basis of these facts, the Board held that, on and after April 30, 1965, UMW had picketed the Leatherwood No. 1 mine for a recognitional purpose at a time when SLU was the bargaining representative of Blue Diamond employees and the contract between SLU and Blue Diamond precluded raising a question concerning representation, and that therefore such picketing violated Section 8(b)(7)(A) of the Act (Pet. App. 24a, 26a). In so concluding the Board

[3] A previous request for recognition by SLU in January or February 1965 had been denied on the ground that it did not then represent a majority of the employees (Pet. App. 38a).

reversed the Trial Examiner, who had found that the recognition of SLU was unlawful on the ground that, since the Company committed an unfair labor practice in August 1964 when it refused to bargain with UMW concerning the return to work of the striking employees, the latter became unfair labor practice strikers who could not be permanently replaced. Since the Company's alleged unfair labor practice occurred more than six months prior to the filing of the charge herein and thus Section 10(b) of the Act would have barred the Board from assessing that conduct directly,[4] the Board, following its earlier ruling in *Roman Stone Construction Co.*, 153 NLRB 659, held that the time-barred event could not properly be used as a basis for impeaching the Company's contract with SLU, which was "valid on its face and of reasonable duration, [and hence] would be a bar to a representation petition" (Pet. App. 26a). The Board ordered UMW to cease and desist its unlawful picketing, and to post appropriate notices (Pet. App. 28a–29a).

The court of appeals sustained the Board's decision and enforced its order (Pet. App. 1a–13a). Relying on *Local Lodge No. 1424, Machinists (Bryan Mfg. Co.)* v. *National Labor Relations Board*, 362 U.S. 411 (discussed *infra*, pp. 7–8), the court concluded that the principle enunciated therein "prevents the resurrection of legally defunct unfair labor practices in the guise of evidence and the resultant subversion of the

[4] Section 10(b) provides that "no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board * * *."

policies promoted by the limitations provisio of section 10(b)," and that to "permit [UMW] to invoke the company's putative unfair labor practices in this case as a defense to the unlawful picketing charge would be directly contrary to this rule" (Pet. App. 12a).

ARGUMENT

The decision of the court of appeals is clearly correct and, contrary to petitioners' contentions, is not in conflict with any other decision. There is thus no occasion for further review.

Section 8(b)(7)(A) of the Act proscribes picketing by a union where "an object" thereof is to force or require an employer "to recognize or bargain" with that union where he "has lawfully recognized * * * any other labor organization and a question concerning representation may not appropriately be raised under section 9(c)." On the facts here (*supra*, pp. 2–4), it is clear that at least an object of the UMW's picketing was to secure recognition and bargaining rights from the Company, and that it engaged in this picketing at a time when the Company had a contract which, on its face, required it to recognize SLU for a three-year term, and thus would have barred a representation petition under Section 9(c) of the Act. Accordingly, all the elements of a violation of Section 8(b)(7)(A) are present here, unless UMW can show, as it attempted to, that the Company's recognition of SLU was unlawful. However, to make such a showing would require establishing that the Company committed an

unfair labor practice more than six months prior to the filing of the charge herein.[5]

In *Local Lodge No. 1424, Machinists (Bryan Mfg. Co.)* v. *National Labor Relations Board*, 362 U.S. 411, this Court held that, where "a collective bargaining agreement and its enforcement are both perfectly lawful on the face of things, and an unfair labor practice cannot be made out except by reliance on the fact of the agreement's original unlawful execution, an event which, because of limitations, cannot itself be made the subject of an unfair labor practice complaint," the policies underlying Section 10(b) would preclude converting "what is otherwise legal into something illegal" (*id.* at 419). Although *Bryan Mfg. Co.* involved the question whether the employer had violated Section 8(a)(1) and (2), and the union Section 8(b)(1)(A) and (2), of the Act by entering into an exclusive recognition contract, with a union security clause, at a time when the union did not represent a majority of the employees, the same principle is equally applicable here. As the Board explained in *Roman Stone Construction Co., supra*, 153 NLRB at 659, n. 3:

> Section 8(b)(7)(A) * * * was intended in part to promote stability in established bargaining relationships, an interest also served both by the contract-bar rules and by Section 10(b). To hold, under the conditions presented herein,

[5] Blue Diamond first refused to deal with UMW as the representative of the employees in August 1964 (*supra*, p. 3). A timely charge testing that refusal would have had to have been filed by February 1965 (see note 4, *supra*). The charge on which the present proceeding is based was filed in December 1965 (*supra*, p. 4).

> that an incumbent union's representative status may be placed in issue as a defense to 8(b)(7)(A) charges would permit a rival union to accomplish by means of picketing what it could not achieve under established Board procedures. Such an application of 8(b)(7)(A) would offend the very policy which that Section was designed to further. Consistent with the congressional scheme, it is our opinion that the term "lawfully recognized" was meant to include all bargaining relationships immune from attack under Sections 8 and 9 of the Act. Accordingly, and as [the contracting union's] representative status could not be litigated under any other Section of the Act, we [hold] that such testimony could not be adduced in the 8(b)(7)(A) proceeding for the purpose of collaterally attacking [the contracting union's] status as statutory bargaining representative. * * **

Contrary to petitioners' claim (Pet. 18–19), the fact that UMW was originally certified as the representative of the Company's employees does not require a contrary conclusion. Although the majority status of a certified union is presumed to continue after the expiration of the certification year, that presumption can be rebutted by objective factors showing that the union has in fact lost its majority status. The Company's resumption of operations with almost an entirely new work force, coupled with SLU's

* As the court below succinctly stated, the Board here properly determined that, "[b]ased on its holding in *Roman Stone*, * * * the UMW could not employ Blue Diamond's alleged unfair labor practice as a shield when section 10(b) barred its use as a sword" (Pet. App. 8a).

subsequent showing of a card majority which was verified by the Company (*supra*, pp. 3–4), were sufficient to undermine the continuing vitality of UMW's original certification. Nor is there substance to petitioners' contention (Pet. 23–24) that Section 10(b) should be tolled because the Company's relationship with SLU was concealed from UMW. It was the Company's refusal to deal with UMW as the representative of the returning strikers which affords the principal basis for challenging the Company's recognition of SLU, and that refusal was clearly communicated to the UMW officials who accompanied the strikers (*supra*, p. 3).[7]

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

ARNOLD ORDMAN,
General Counsel,
DOMINICK L. MANOLI,
Associate General Counsel,
NORTON J. COME,
Assistant General Counsel,
LINDA SHER,
Attorney,
National Labor Relations Board.

MAY 1970.

[7] On April 30, 1965, the company also notified UMW by letter that it no longer considered it the representative of its employees (*supra*, p. 4).

U.S. GOVERNMENT PRINTING OFFICE: 1970